Supreme Court, U. S.
FILED
NOV 18 1974
MICHAEL RODAK, JR., CLERK

No. 74-611

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
STUART A. SMITH,
Assistant to the Solicitor General,
ROBERT E. LINDSAY,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	3
Reasons for granting the writ	7
Conclusion	12
Appendix A	1a
Appendix B	2a
Appendix C	24a

CITATIONS

Cases:	
Bellis v. *United States*, No. 73–190, decided May 28, 1974	8
Bouschor v. *United States*, 316 F. 2d 451	12
Boyd v. *United States*, 116 U.S. 616	8
Couch v. *United States*, 409 U.S. 322	7, 8, 9, 11
Harris, Matter of, 221 U.S. 274	9
United States v. *Fisher*, 500 F. 2d 683, petition for a writ of certiorari pending, No. 74–18	10, 12
United States v. *Goldfarb*, 328 F. 2d 280, certiorari denied, 377 U.S. 976	9
United States v. *Judson*, 322 F. 2d 460	12
United States v. *Threlkeld*, 241 F. Supp. 324	9
United States v. *White*, 477 F. 2d 757, affirmed per curiam en banc, 487 F. 2d 1335, certiorari denied, October 15, 1974, No. 73–1308	10

563-237—74——1

Constitution and statute:
United States Constitution: Page
Fourth Amendment 6
Fifth Amendment 2, 6, 7, 8, 11, 12
Internal Revenue Code of 1954, 26 U.S.C. 7602 ..... 2, 5
Miscellaneous:
VIII Wigmore, *Evidence* (McNaughton rev., 1961) 9

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America and James S. Mabrey, a special agent of the Internal Revenue Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

There is no written opinion by the district court. The order of the district court is set forth in Appendix A, *infra,* p. 1a. The opinion of the court of appeals (Appendix B, *infra,* pp. 2a–23a) is reported at 499 F. 2d 444.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1974 (Appendix C, *infra,* p. 24a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to produce an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

2. If the client's privilege against self-incrimination is available as a bar to production of his accountant's workpapers in these circumstances, whether the claimant's attorney can properly invoke his client's privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, provides in pertinent part as follows:

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—

> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

On January 3, 1973, two special agents of the Internal Revenue Service interviewed Dr. Edward Mason in his office. The agents advised Dr. Mason that his income tax returns for the years 1969, 1970 and 1971 were under investigation and gave him *Miranda* warnings. The agents thereupon conducted a two-hour interview of Dr. Mason concerning his personal background, financial dealings and the manner in which his records were kept. During the visit, one of the agents requested permission to examine Mason's personal books and records and Dr. Mason complied with the request. The agent only casually examined the records to ascertain whether they were complete and he stated that he thought some were

missing. Dr. Mason replied that if any records were missing, they would be at the accountant's office (Appendix B, *infra,* pp. 2a–3a; R. 60–61).[1]

Dr. Mason thereupon called his accountant, Jerry A. Candy, whose firm had been retained by him and his wife to prepare their tax returns for the years 1969, 1970 and 1971 (R. 18). Candy advised Dr. Mason not to show his records to the agents. Although Dr. Mason stated to the agents that he was undecided whether or not to furnish his records to them, he followed his accountant's advice and denied them further access to his records (Appendix B, *infra,* p. 3a; R. 60–61).

Following Dr. Mason's telephone call, his accountant immediately called C. D. Kasmir, an attorney, and informed him of the situation (R. 83, 97). Kasmir had not previously represented Dr. Mason. However, he promptly telephoned him and advised him not to say anything or to give the agents any records (R. 97–98, 101). During this telephone call, Dr. Mason retained Kasmir as his legal representative (R. 100). Immediately after speaking to Kasmir, Dr. Mason withdrew the records which he had placed before the agents and terminated the interview at approximately four o'clock in the afternoon (Appendix B, *infra,* p. 3a; R. 61–62).

Early the next morning, at 7:30 a.m., Candy delivered an assortment of records and documents to the

[1] "R." references are to the separately bound appendix filed in the court of appeals.

office of Dr. Mason (R. 84, 98).[2] As Kasmir, the attorney, testified, "Dr. Mason took possession of the records, signed the receipt,[3] turned around and handed them to me and I went and placed them in my car" (R. 84, 89–90, 98–99). Later that day, Special Agent Mabrey called the accountant to arrange a meeting. The accountant told Mabrey that he did not have the records he was seeking, but that the records were in the possession of Kasmir. The accountant further told Mabrey that he would be happy to meet with him at Kasmir's office (R. 64).

On the following day, Agent Mabrey served internal revenue summonses on Candy and Kasmir pursuant to Section 7602 of the Internal Revenue Code of 1954 (R. 66). The summons to Kasmir (R. 8–9) sought the production of specified records[4] and the summons to Candy (R. 10–11) sought testimony concerning these records. Both Candy and Kasmir ap-

[2] According to the accountant, the records turned over to the taxpayer included accountant's workpapers, and other miscellaneous data and correspondence (R. 89–90).

[3] The receipt signed by the taxpayer indicated that the accountant turned over records and documents described as follows: "1969, 1970 and 1971 Tax Files, Quarterly Tax Files, and Bookkeeping Files. 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements" (R. 30).

[4] The documents and records sought by the summons were as follows (R. 8, 10):

> 1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
>
> 2. Retained copies of E. J. Mason's income tax returns for 1969, 1970, and 1971.
>
> 3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971.

peared before Agent Mabrey but refused to comply with the summonses (R. 6–7, 67). Candy asserted that he was not in possession of any of the records sought by the summons at the time it was served upon him and relied upon the attorney-client privilege in refusing to answer any questions (R. 25). Kasmir also relied upon the attorney-client privilege and the Fourth and Fifth Amendments (Appendix B, *infra*, pp. 3a–4a; R. 26).

Upon Candy's and Kasmir's refusal to comply with the summonses, this enforcement action was commenced in the United States District Court for the Northern District of Texas (R. 1–11). After a hearing, the district court ordered the summonses enforced, directing Kasmir to produce the records and Candy to testify concerning them. The court found that the records sought belonged to the accounting firm, that the taxpayer could not "make them a part of his records by requesting the accountant to deliver them to him," and that the records were in the possession of Kasmir at the time of the service of the summons (Appendix A, *infra*, p. 1a; Appendix B, *infra*, pp. 3a–4a; R. 126–127).

With one judge dissenting, the court of appeals reversed the district court order insofar as it required Kasmir to produce the documents.[5] While recognizing that the actions of the taxpayer, his accountant and his attorney were an attempt to put the requested records beyond the reach of the tax investigation, the court held that the taxpayer had acquired "rightful possession" because the transfer took place prior to

service of the summons and that he retained constructive possession of the records after their transfer to the attorney. The court of appeals further held that the attorney had standing to assert his client's Fifth Amendment privilege against self-incrimination (Appendix B, *infra*, pp. 2a–21a).

The dissenting judge was of the view that a taxpayer has no legitimate expectation of personal privacy with respect to his accountant's workpapers and therefore can not assert the privilege against self-incrimination to bar their production. He further stated that the attorney-client privilege is not available "initially and directly as a strategem or device to place preexisting documentary evidence beyond the reach of the law" (Appendix B, *infra*, p. 22a).

REASONS FOR GRANTING THE WRIT

The court below held, erroneously in our view, that the privilege against self-incrimination can be invoked on behalf of a person whose tax liability is under investigation to defeat enforcement of an internal revenue summons with respect to workpapers prepared and previously held by his accountant if the taxpayer serves as a conduit for the transfer of the accountant's papers to the custody of the taxpayer's attorney. The issue is of major importance to

[5] The court of appeals held that under *Couch* v. *United States*, 409 U.S. 322, the government "is entitled to enforcement of the summons served upon accountant Candy for his testimony concerning the sought-after documents" (Appendix B, *infra*, p. 20a).

563-237—74——2

the conduct of federal tax investigations, and the decision below squarely conflicts with that of another court of appeals.

1. In *Couch* v. *United States,* 409 U.S. 322, this Court reaffirmed that the Fifth Amendment privilege against self-incrimination is an initimate and personal right. While the privilege has been held to cover books and records in *Boyd* v. *United States,* 116 U.S. 616, the Court has explicitly limited the scope of the claim in those circumstances to private papers. Thus, in *Couch* v. *United States, supra,* 409 U.S. at 330, n. 10, the Court observed that "[a] later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.' United States* v. *White,* 322 U.S. 694, 699 (1944). (Emphasis added.)" See, also, *Bellis* v. *United States,* No. 73–190 (decided May 28, 1974), slip op. 5. In *Couch* v. *United States, supra,* the Court held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the compelled production of the records by the accountant. Since the claimant of the privilege in *Couch* did not have possession of the records in question, the Court concluded that "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329).

While *Couch* emphasized the absence of possession of the summoned documents by the claimant, the decision below erroneously concluded that the taxpayer's

status as a conduit for the summoned workpapers between his accountant and his attorney was sufficient to establish the requisite constructive possession of them for purposes of the privilege against self-incrimination. But the summoned workpapers in this case were not the private papers of the taxpayer for they originated with and belonged to the accountant. If anyone remained in constructive possession of the papers after their transfer to the attorney, it was the accountant (who would be required under the summons to authenticate and testify about them) rather than the taxpayer.[6] Surely compelled production by the attorney of the accountant's papers in these circumstances does not constitute the "extortion of information from the accused himself that offends our sense of justice" (*Couch* v. *United States, supra,* 409 U.S. at 328). As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

Like the dissenting judge below, we see little differ-

[6] The court below correctly recognized that the attorney-client privilege is not applicable to the accountant's workpapers (Appendix B, *infra*, pp. 17a–18a). That privilege applies only to confidential communications between attorney and client, and does not encompass communications between the attorney and third persons unless the third person is merely acting as an agent in transmitting the communication from the client to the attorney. See VIII Wigmore, *Evidence* (McNaughton rev., 1961), Sec. 2317, p. 619; *United States* v. *Goldfarb,* 328 F. 2d 280 (C.A. 6), certiorari denied, 377 U.S. 976; *United States* v. *Threlkeld,* 241 F. Supp. 324 (W. D. Tenn.). And the taxpayer's disclosures to the accountant were, of course, not privileged. See *Couch, supra,* 409 U.S. at 335, and cases cited therein.

ence between the facts here and the situation where a taxpayer arranges for his accountant to transfer the accountant's workpapers directly to his attorney—a situation in which the court below reached the opposite result in *United States* v. *White,* 477 F. 2d 757, affirmed *per curiam en banc,* 487 F. 2d 1335, certiorari denied, October 15, 1974, No. 73-1308. The fact that the papers here, unlike those in *White,* momentarily passed through the hands of the taxpayer in their journey from the accountant to the attorney is, in the words of the dissent below, a distinction "exalting form over substance * * *" (Appendix B, *infra,* p. 23a).

Recognizing that the availability of the privilege against self-incrimination should not turn upon such a tenuous distinction, the Third Circuit has recently upheld the enforcement of an internal revenue summons in circumstances parallel in all material respects to those here. *United States* v. *Fisher,* 500 F. 2d 683, petition for a writ of certiorari pending, No. 74-18. In view of the square conflict between the decision below and *Fisher* with respect to an issue of great importance to the enforcement of the internal revenue laws, we are acquiescing in the granting of the petition in that case. The Court may deem it appropriate to hold the present petition pending its disposition of *Fisher.*[7]

2. Having concluded that the accountant's workpapers were protected by the taxpayer's privilege against self-incrimination, the court below further

[7] We are serving a copy of this petition upon the petitioners in No. 74-18, and a copy of our response in No. 74-18 upon the respondents here.

erred in holding that the claimant's attorney could properly invoke his client's privilege. Acknowledging that "there is no unanimity among the courts in their answers to the question posed * * *," the court of appeals held that "the realities of tax litigation require that the attorney be allowed to press his client's claim where the client could successfully do so" (Appendix B, *infra,* p. 19a).

We do not believe that the "realities" of tax litigation or any other type of litigation compel this conclusion. Indeed, there are important practical reasons why an attorney should not be permitted to invoke his client's privilege against self-incrimination—at least where, as here, the client is available to intervene and assert the claim for himself. The Fifth Amendment privilege is an "intimate and personal one" adhering to the person of the claimant (*Couch* v. *United States, supra,* 409 U.S. at 327). It is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis for the claim. And, with respect to documentary evidence, there may be need to determine whether the documents sought are the private papers of the claimant. For all these reasons, the claimant should be required to come forward and assert the claim of privilege himself, and to answer pertinent questions concerning the factual basis for the claim.

As the court below observed, there is a conflict on this question, which has application to both court

and grand jury proceedings. In *Bouschor* v. *United States,* 316 F. 2d 451, the Eighth Circuit held that an attorney could not assert the privilege against self-incrimination on behalf of his client. However, in *United States* v. *Judson,* 322 F. 2d 460, 463–467, the Ninth Circuit, like the court below, reached the opposite conclusion. This question is not involved in the *Fisher* case, *supra,* because the taxpayers there intervened in the district court to assert the privilege for themselves. And should this Court affirm in *Fisher,* the question of the attorney's standing to raise his client's privilege would no longer be material in the present case because the claim of privilege would in any event necessarily fail. Should this Court reverse in *Fisher,* however, we believe the present petition should then be granted in order to resolve the conflict with respect to an attorney's standing to invoke his client's Fifth Amendment privilege against self-incrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or, if the Court deems it appropriate, held pending the disposition of *Fisher* v. *United States,* No. 74–18.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
STUART A. SMITH,
Assistant to the Solicitor General.
ROBERT E. LINDSAY,
Attorney.

NOVEMBER 1974.

U. S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX A

Order—March 28, 1973

(Number and title omitted)

(Filed: March 28, 1973)

This matter having come on for hearing before the undersigned on March 28, 1973, pursuant to the petition and affidavit of petitioners and on order of the District Court to show cause, the parties having been heard and the Court finding that the records described in the two Internal Revenue summonses at issue belong to the accounting firm of Tannebaum, Binder, and Lewis and are in possession of the respondent, C. D. Kasmir, it is

ORDERED that C. D. Kasmir obey the summons served upon him on January 5, 1973, by the petitioner, Special Agent James A. Mabrey, by appearing before Special Agent Mabrey on April 16, 1973, at 10:00 A.M., at room 11G47, 1100 Commerce, Dallas, Texas, then and there to produce for inspection all of the accountant's workpapers, reports, tax returns and documents described in the aforementioned summons. It is further

ORDERED that the respondent, Jerry A. Candy, obey the summons served upon him on January 5, 1973, by Special Agent Mabrey, by appearing before the said agent at the same time and place as C. D. KASMIR, then and there to testify as concerns the described accountant's records.

ROBERT M. HILL,
United States District Judge.

Dated: MARCH 28, 1973.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 73–1973

UNITED STATES OF AMERICA AND JAMES S. MABREY, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLEES

v.

C. D. KASMIR AND JERRY A. CANDY, DEFENDANTS-APPELLANTS

Aug. 21, 1974

Appeal from the United States District Court for the Northern District of Texas

Before BELL, THORNBERRY and DYER, Circuit Judges, THORNBERRY, Circuit Judge

In United States *v.* White, 5th Cir. 1973, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335, we phrased the issue presented thusly:

> * * * whether the constitutional privilege against compulsory self-incrimination may be invoked in behalf of a taxpayer by his attorney to prevent the production of income tax workpapers in his attorney's possession * * *.

That same issue is before us again, this time with a different factual background.

On January 3, 1973, the taxpayer, Dr. Mason, was visited in his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that his tax returns for the years 1969,

1970, and 1971 were under investigation and gave him *Miranda* warnings. During the visit, one of the Special Agents asked to see Dr. Mason's personal books and records. Dr. Mason complied with the request, but at the same time, he called his accountant Candy, who advised him not to show any of his records to the Agents. The doctor followed Candy's advice, withdrew the records on the desk, and concluded the interview.

Following Dr. Mason's call to Candy, Candy called Kasmir and informed him of the visit. At Candy's request, Kasmir called Dr. Mason that afternoon and was retained by the doctor as his attorney. Early the next morning, at the direction of his employer, Candy delivered an assortment of records and documents to Dr. Mason at the doctor's office, and simultaneously relinquished to the taxpayer "the rightful, indefinite and legitimate possession of" the materials. Within minutes of receiving the materials, the taxpayer turned them over to appellant Kasmir as his attorney.

The next day summonses were served on Candy and Kasmir, ordering the latter to give up the documents and the former to give testimony concerning them.[1]

---

[1] The following documents were summoned:

1. Accountant's work papers pertaining to Dr. Mason's books and records of 1969, 1970, and 1971.

2. Retained copies of Dr. Mason's income tax returns for 1969, 1970, and 1971.

3. Retained copies of reports and other correspondence between [the accounting firm] and Dr. Mason during 1969, 1970, and 1971.

The government did not seek the documents which Dr. Mason permitted the Agents to examine during their initial visit and admitted that those documents could be withheld by the doctor if he invoked a Fifth Amendment self-incrimination claim.

The summons was issued pursuant to 26 U.S.C. § 7602 (1964 ed.), which provides:

"Examination of Books and Witnesses.

563-237—74——3

When neither appellant agreed to comply with the summonses, the government sought enforcement. In a pre-*White* and pre-Couch *v.* United States hearing and order, the district court granted the government's petition on the grounds that the records were owned by the accounting firm and that at the time the summonses were served, the records were in Kasmir's possession. The district court stayed its order pending this appeal.

Appellants contend that in the circumstances of this case, (1) the taxpayer's attorney has standing to raise the taxpayer's constitutional right to be free from self-incrimination, (2) enforcement of the summons for the production of records violates the taxpayer's Self-Incrimination Privilege, and (3) enforcement of the summons for production of records should be denied because IRS agents materially misrepresented themselves before the taxpayer.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

Following the procedure employed in *White,* we begin with appellants' second contention, for recognition of standing in the attorney would be of little comfort to appellants unless the attorney's client does have Fifth Amendment rights in the summoned materials. Appellants contend here, as the appellant did in *White,* that enforcement of the summons violates the taxpayer's privilege because possession of the records by the taxpayer's attorney constitutes constructive possession by the taxpayer. Initially faced with our en banc decision in *White* as a formidable wall to scale, appellants have launched a methodical effort in order to disabuse us of the notion that *White* compels their defeat. They argue that the taxpayer doctor's actual possession of the summoned documents is a crucial factual distinction between this case and *White.* They see further significance in the fact that here the taxpayer turned the papers over to his attorney pursuant to their attorney-client relationship while in *White* the transfer of the documents was not from the client to the attorney but from the taxpayers' accountant to the attorney. Both parties agree that the question before his court is whether those factual differences warrant a result different from that reached in *White.*

The government attacks the appellants' position from two sides. First, the government argues that an accused may not object to summons of records owned by third parties even if in the accused's possession. The government's theory is that an accused cannot invoke the Fifth Amendment privilege against self-incrimination unless he both owns and possesses the documents in question. Second, the government contends that the taxpayer never had "rightful possession" of the papers because this enterprise by the appellants and the taxpayer was "a frantic last min-

ute effort to put the requested records beyond the reach of a legitimate tax investigation" by "winning a footrace with agents of the government."

In the theatre of criminal tax investigations, few issues have been more hotly contested than the determination of the scope of the Fifth Amendment privilege against self-incrimination. Drawing heavily upon the historical evolution of the privilege, the Supreme Court in Couch *v.* United States, 1973, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548, has now spoken on the subject before us in a manner that guides our journey far down the road to judgment, but not to the very end. Lillian Couch was the sole proprietress of a restaurant who, since 1955, had given all of her financial records to an independent accountant for the purpose of preparing her income tax returns, although she retained title to the records. After a summons had been issued and served upon the accountant, the taxpayer instructed the accountant to deliver all of the sought-after documents directly to her attorney. In upholding enforcement of the summons against the accountant, the Supreme Court held that the taxpayer had no Fifth Amendment privilege in documents which she merely owned, which had been in the continuous possession of an independent accountant for over a decade, and with respect to which she could show no legitimate expectation of privacy.

The Court began its inquiry by quoting from Murphy *v.* Waterfront Comm'n of New York Harbor, 1964, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678, on the nature of the Self-Incrimination Privilege and the interests it was designed to protect. Writing for the Court in *Murphy,* Justice Goldberg offered this statement:

> * * * It [the privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," United States *v.* Grunewald, 2 Cir., 233 F. 2d 556, 581–582 (Frank J., dissenting), rev'd 353, U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Quinn *v.* United States, 349 U.S. 155, 162, 75 S. Ct. 668, 673, 99 L. Ed. 964.

Id., 378 U.S. at 55, 84 S. Ct. at 1596–1597.

The *Couch* Court held that actual possession, rather than ownership, "bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime." Couch *v.* United States, supra, 409 U.S. at 333, 93 S. Ct. at 618. But the Court was careful to note that "actual possession" is not necessarily the *sine qua non* for successful assertion of the Fifth Amendment privilege:

> * * * Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and

BEST COPY AVAILABLE

> insignificant as to leave the personal compulsions upon the accused substantially intact. * * *

Id. The Court explained further:

> * * * We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids * * * [W]e do not adopt any *per se* rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court * * *

Id., 409 U.S. at 336, 93 S. Ct. at 620 n. 20.

As a positive indication that lack of physical possession is not necessarily determinative, the Court did not stop with its conclusion that the papers were in the possession of the accountant, not the taxpayer, at the time the summons was served, but inquired further into the nature of the records sought by the summons and concluded that the taxpayer could show no legitimate expectation of privacy with regard to them because

> * * * there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he knowingly assists in the preparation of a false return. * * * His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, * * *, an expectation of protected privacy or confidentiality.

Id., 409 S. Ct. at 335, 93 S. Ct. at 619, 34 L. Ed. 2d at 558.

Thus the method adopted by the Court focuses the inquiry on two factors: (1) the party in possession of the evidence and (2) where the actual possessor is not the taxpayer, the taxpayer's legitimate expectation of privacy with regard to the evidence. By considering not only the question of physical, personal compulsion upon the accused, but also any expectation of privacy which might reasonably attach to the summoned materials, the Court was weighing the extent to which any of the variety of policies enumerated in *Murphy* would be furthered by application of the privilege. Indeed, in *Murphy,* the Court noted that "it will not do . . . to assign one isolated policy to the privilege," and on that basis to decide whether applying the privilege is in furtherance of "the" policy. Murphy *v.* Waterfront Comm'n of New York Harbor, supra, 378 U.S. at 56 n. 5, 84 S. Ct. at 1597 n. 5.

We had our first opportunity to apply the lesson of *Couch* only recently in United States *v.* White, supra, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335. After an IRS investigation had commenced but prior to the issuance of a summons, the taxpayers' accountant had turned over workpapers and other documents directly to the taxpayers' attorney White. A year later, a summons was served upon the attorney who resisted enforcement by asserting his client taxpayers' Fifth Amendment privilege. Since the taxpayers were obviously not in actual possession of the requested material, their only hope lay in their contention that they were in constructive possession through their attorney. Although the high court did not attempt to

define that term in *Couch,* in writing for this court in *White,* Judge Gewin attempted to explicate the Supreme Court's thinking:

> * * * As possible examples of such a case the Court cited Schwimmer *v.* United States and United States *v.* Guterma. In both of these cases a claim of privilege was successfully asserted to prevent the government from obtaining documents the parties had temporarily stored on the premises of corporations. The reference to these cases in *Couch* indicates that a claim of privilege might be valid on the constructive possession theory if the taxpayer has placed papers in the hands of another person or entity for custodial safekeeping, thereby retaining the right to immediate possession though not having actual possession * * *

United States *v.* White, supra, 477 F. 2d at 763. Unfortunately for the taxpayers in *White,* they could not fall within that definition. The taxpayers had never been in actual possession of the papers sought by the government. The attorney had obtained the documents directly from the accountant without record evidence that he had done so upon the taxpayers' instructions or that they were even aware that he had secured them. The parties to the transfer, White and the accountant, had agreed that White—not the taxpayers—could keep the papers indefinitely, but that they would be returned to the accountant upon completion of White's work. Thus, the taxpayers retained no right to immediate possession; indeed they "retained" nothing. Their actions could not be said to have evinced any legitimate expectation of privacy. Under those circumstances, to have permitted the attorney to assert the taxpayers' privilege would have been inconsistent with the nature of the right against self-incrimination and with the interests it was designed to protect.

It is with this lengthy prelude that we finally meet appellants' and the government's contentions head-on. Our reading of *Couch* convinces us that there is no basis for adopting the government's position that ownership is a prerequisite to the assertion of the privilege. Indeed, the Court eschewed any reliance on ownership as an important factor. "To tie the privilege . . . to a concept of ownership would be to draw a meaningless line." Couch *v.* United States, supra, 409 U.S. at 331, 93 S. Ct. at 617. To agree with the government here would be not only to read *Couch* perversely, but also to ignore the historical elaboration of the Fifth Amendment privilege. We choose instead to adhere to the test enunciated in *Couch,* a test which depends upon the policies and purposes of the privilege.[2]

The government's most appealing argument is that the taxpayer had no "rightful possession" here because this enterprise by the taxpayer, his accountant, and his attorney was "a frantic last minute effort to put the requested records beyond the reach of a legitimate tax investigation" by "winning a footrace with agents of the government." In spite of the argument's great superficial persuasiveness, we reject it.

In *Couch,* the Supreme Court refused to consider the fact that the documents sought were presently in the possession of the taxpayer's attorney because the transfer from accountant to attorney had occurred after the summons had been served on the accountant.

> * * * [C]onstitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them. * * *

[2] The ownership might be a relevant factor to consider in determining a taxpayer's legitimate expectation of privacy with respect to summoned materials not in his possession, although that factor would not be dispositive.

Couch *v.* United States, supra, 409 U.S. at 329, 93 S. Ct. at 616 n. 9, 34 L. Ed. at 554. But in the present case, the transfer of records occurred before the summons had been served. Indeed, the summons was issued and served the day following the taxpayer's possesion.

The government would have this court hold that the rights and obligations of the parties become fixed when the Special Agent makes his first appearance and confronts the taxpayer with the unwelcome news that he is under investigation for criminal violations of the tax laws. But there is no support for that position in *Couch;* on the contrary, the Court has already made a choice which indicates disapproval of the government's position.[3] *See* United States v. White, supra, 477 F. 2d at 762 n. 12.

We fully agree with the government that a post-summons transfer of the documents is to be ignored in the determination of the applicability of the Fifth Amendment privilege. *Couch* demands no less. But the corollary proposition is that while the appellants and the taxpayer have in fact attempted to put the requested records beyond the reach of a tax investigation, that action is wholly proper as long as the transfer occurs before the summons is served. In our judgment, it would be highly improper and a serious derogation of the Fifth Amendment right if we were to test appellants' contention by asking whether they

[3] The only reported opinion which appears to adopt the government's position is United States *v.* Widelski, 6th Cir. 1971, 452 F. 2d 1, cert. denied, 1972, 406 U.S. 918, 92 S. Ct. 1769, 32 L. Ed. 2d 117. But that opinion is nowhere cited in *Couch.* Instead the Court cited United States *v.* Zakutansky, 7th Cir. 1968, 401 F. 2d 68, 72, cert. denied, 1969, 393 U.S. 1021, 89 S. Ct. 628, 21 L. Ed. 2d 565, and United States *v.* Lyons, 1st Cir. 1971, 442 F. 2d 1144, both of which held that constitutional rights may be enlarged by a transfer of records which occurs after a summons is served.

have attempted to keep evidence out of the hands of the investigators. For every successful claim of privilege frustrates to some extent the government's ability to gather evidence. In this context, the Fifth Amendment privilege demands that the government "shoulder the entire load" in its contest with the individual. Murphy *v.* Waterfront Comm'n of New York Harbor, supra; 8 Wigmore, Evidence (McNaughton rev., 1961) p. 317.

But more importantly, and regardless of the timing of the transfers, appellants could not put the records beyond the reach of the IRS unless the material were properly the subject of a Fifth Amendment claim.[4] In this regard, some categorical statements can be made. Following *Couch,* it is clear that the taxpayer could assert no Fifth Amendment privilege in the records while they were held by his accountant. It is likewise clear from *Couch* that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served. Had he at that point followed Judge Gewin's analysis and placed the materials in a safe under his control, he could have successfully invoked the privilege by relying upon his constructive possession. *See* Schwimmer *v.* United States, 8th Cir. 1956, 232 F. 2d 855; United States *v.* Guterma, 2nd Cir. 1959, 272 F. 2d 344. Instead the taxpayer transfers the materials to his attorney for safekeeping and for the preparation of his defense.

We are thus faced with this dilemma: If we hold

[4] The process for determining the incriminating character of evidence is plainly set forth in Hoffman *v.* United States, 1951, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118. But the incriminating character of the materials sought here has not been put in issue.

that no Fifth Amendment privilege is now available, then the taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him. Indeed, we make it almost appear as though the taxpayer must now closet himself with his myriad tax data drawn up around him and permit the attorney to study or possess the records only when the taxpayer is in a position to grab them physically, lest some furtive and surreptitious agent may swoop down with a summons while the attorney is fingering the treasure. On the other hand, if we hold that the Fifth Amendment privilege is available here, then we make it appear as if the applicability of the privilege is more a matter of the form of the transfer than the substance behind the privilege since the most important difference between this case and *White* is taxpayer's fleeting actual possession between that of the accountant and that of the attorney.

But even dilemmas sometimes admit of sensible resolution, and in any case, decide we must. To make the correct choice, we return to the principles announced in *Couch* and *White*. In its most distilled form, the question is whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession. Couch *v.* United States, supra, 409 U.S. at 334–338, 93 S. Ct. at 619–620.

Couch held that a taxpayer could claim no legitimate expectation of privacy in records which he left with an accountant for the purpose of preparing the taxpayer's personal income tax returns. When the taxpayer in the present case received the records from his accountant, the taxpayer's physical possession became the "private enclave" which the Fifth Amendment privelge was designed to protect. It makes no

difference that the taxpayer could claim no legitimate expectation of privacy when the records were held by the accountant, for it has not been suggested that a taxpayer in possession of records can be compelled to produce them because they have previously been used in preparing his own income tax return. For Fifth Amendment purposes, that the government can summon the documents from the accountant does not mean that those same documents can be summoned from the taxpayer. As the Ninth Circuit put it, "that the government might obtain these documents without compelling [the taxpayer] to incriminate himself is hardly a justification for compelling [the taxpayer] to incriminate himself." United States *v.* Cohen, 9th Cir. 1967, 388 F. 2d 464, 469; *see also* Silverthorne Lumber Co. *v.* United States, 1920, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319.

When the taxpayer subsequently transferred his records to his attorney pursuant to the attorney-client relationship, in our judgment he retained that legitimate expectation of privacy or private enclave with respect to the records. We reject the notion, as we did in *White,* that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into his attorney's hands. *See also* Falsone *v.* United States, 5th Cir. 1953, 205 F. 2d 734, 738. But we also reject the idea that a taxpayer's right to be free from self-incrimination can be *decreased* or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship.[5]

[5] 8 Wigmore, Evidence (McNaughton rev. 1961) § 2307:

"Is the attorney compellable to *produce in court*, by subpoena or bill of discovery, the documents placed in his possession by the client?

* * * * *

"The answer here depends upon the other privileges of the client *irrespective of* [the attorney-client privilege]. The attor-

In *White,* in order to permit assertion of the privilege, we would have had to recognize that the transfer from the accountant to the attorney *created* a right in the taxpayer where none existed before. And in *Couch,* the taxpayer gave up the Amendment's protection when she gave her records to her accountant for the purpose of preparing tax returns and never regained the protection before the materials were summoned. Quite aside from the fact that the attorney in *Couch* came into possession of the records after the summons had been served and thus after all rights and obligations had vested, to have allowed assertion of the privilege there would have been to *create* rather than *retain* a privilege in the taxpayer. Neither the Supreme Court nor this court could approve such a result.

---

ney is but the agent of the client to hold the deed. If the client is compellable to give up possession, then the attorney is: if the client is not, then the attorney is not. It is merely a question of possession, and the attorney in this respect is like any other agent. There is, to be sure, the added consideration of policy—namely, that if the attorney were not compellable when the client was, then the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney.

* * * * *

"It follows, then, that *when the client himself would be privileged* from protection [sic] of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. Such has invariably been the ruling. On the other hand, if the *client would be compellable* to produce . . . then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure." (Emphasis in original.)

See also United States *v.* Judson, 9th Cir. 1963, 322 F. 2d 460, 466: "The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less."

But where the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of the materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege,[6] which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association absolutely forbid an attorney from knowingly revealing either a "confidence" or a "secret" of his client. A "confidence" refers to information protected by the attorney-client privilege while a "secret" refers to any other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA Code of Professional Responsibility, DR 4-101(A), (B)(1). Of course, the taxpayer cannot assert the attorney-client *relationship,* as distinguished from the attorney-client privilege, as a basis for denying enforcement of the summons. But even where there is no attorney-client *privilege* in certain material, as here, the taxpayer client may still have a

---

[6] The ABA Code of Professional Responsibility, Ethical Consideration 4-4 provides in part:

"The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention.

Stripped of any constitutional perspective, the factual differences between this case and *White* may seem insignificant. But we find constitutional significance both in the actual possession by the taxpayer before the summons was served and in the transfer from the taxpayer to the attorney pursuant to the attorney-client relationship. We conclude that the taxpayer here retained a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus that he retained Fifth Amendment protection. As a matter of constitutional law, we can see no other way to resolve the apparent dilemma in a manner which is consistent with the nature of the right against self-incrimination and in furtherance of the interests it was designed to protect.

We are convinced that our result is consistent with the policies and purposes of the Self-Incrimination Privilege in spite of the government's contention that the taxpayer's evanescent possessions is wholly inadequate to raise the privilege. If the taxpayer had possessed the papers for only one more day, when the summons was served, he could have successfully asserted the privilege. The government has not suggested a method by which we could distinguish the taxpayer's possession here from something more permanent. Nor has the government offered any reason why we should compel the taxpayer to hold onto the documents for a particular period of time. In our judgment, the taxpayer's short-lived possession was sufficient to permit a claim based on the Self-Incrimination Privilege, and the subsequent transfer to his attorney evidenced a sufficient legitimate expectation of privacy to permit the taxpayer to retain the Amendment's protection through constructive possession.

This does not end the matter, however, for we must now answer the question which we left unanswered in *White:* whether the taxpayer's attorney has standing to assert the taxpayer's claim of privilege. If he does not, then the district court's order is to be affirmed, because the taxpayer has not intervened in his own behalf. Although there is no unanimity among the courts in their answers to the question posed, in our judgment the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege. United States *v.* Judson, 9th Cir. 1963, 322 F. 2d 460, 463–465; Colton *v.* United States, 2nd Cir. 1962, 306 F. 2d 633, 639, cert. denied, 1963, 371 U.S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499; Brody *v.* United States, 1st Cir. 1957, 243 F. 2d 378, 387 n. 5, cert. denied, 354 U.S. 923, 77 S. Ct. 1384, 1 L. Ed. 2d 1438; 8 Wigmore, Evidence § 2307 (McNaughton rev., 1961); Grant *v.* United States, 1913, 227 U.S. 74, 33 S. Ct. 190, 57 L. Ed. 423; Application of House, N.D. Cal. 1956, 144 F. Supp. 95; *but cf.,* Bouschor *v.* United States, 8th Cir. 1963, 316 F. 2d 451, 458–459. As the Ninth Circuit explained in United States *v.* Judson, supra, the realities of tax litigation require that the attorney be allowed to press his client's claim where the client could successfully do so:

> * * * No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is per-

> mitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry * * *

United States *v.* Judson, supra, 322 F. 2d at 467. While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure.

Thus the IRS is not entitled to enforcement of the summons directed to attorney Kasmir for the production of documents. However, in light of *Couch,* the IRS is entitled to enforcement of the summons served upon accountant Candy for his testimony concerning the sought-after documents. Whether, as a practical matter, enforcement of this summons is of any benefit to the government in its investigation is purely a matter for the IRS to consider. As a constitutional matter, the accountant's testimony cannot offend the taxpayer's Self-Incrimination Privilege. Couch *v.* United States, supra.

The result which we reach here does not make us any less mindful of the overriding necessity of collecting the tax revenues. At the same time, we must also remember that the investigative power of the Internal Revenue Service is fundamentally inquisitorial, that the government's power lies not in the fashion of the Courts of the Star Chamber and the High Commission,[7] but in its ability to invade, in a civilized manner, the personality and privacy of every citizen in the United States.

---

[7] Whose only limitation was that whatever torture might be applied, it could not be such as to draw blood from the victim. Hence the popularity of the rack. *See* 40 Brooklyn L. Rev. 211, 213 n. 10 (1973); *see also* L. Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968).

When the Constitution was first ratified, the citizens of this country were not yet dependent upon attorneys to decipher complex tax laws. And at that time, the specter of the more brutal forms of compulsory self-incrimination was all that required concern. Today, however, the government's power can be used to stimulate a taxpayer's dependence upon his attorney and the predictable transfer of his records. Once so transferred, the government argues, the materials are subject to compelled disclosure. In our judgment, the inherent power thus to compel indirectly an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly. United States *v.* Judson, supra, 322 F. 2d at 468. The policies and purposes of the Self-Incrimination Privilege do not change merely because new techniques or devices for compulsion have replaced the old. Put another way, we must never forget that it is a constitution we are expounding. M'Culloch *v.* Maryland, 1819, 4 Wheat. 316, 407, 4 L. Ed. 579, 601.[8]

Affirmed in part, reversed in part.

BELL, *Circuit Judge* (dissenting):

I respectfuly dissent.

The operative facts here are:

(1) The records sought to be produced are owned by the accountant and not taxpayer (the records had to do with taxpayer's tax returns). The government did not seek the production of records owned by taxpayer.

(2) When the taxpayer telephoned the accountant to say that the agents were in his office, the accountant advised taxpayer to say nothing and not to produce his records.

---

[8] Because of our disposition of this appeal, we need not consider appellants' final contention.

(3) The accountant then selected a lawyer for taxpayer, took the records in question (the accountant's records), to the taxpayer's office early the next morning, where he handed them to taxpayer who, in turn, handed them to the lawyer.

I dissent for two reasons. First, taxpayer can take no comfort in the activity of the accountant and lawyer. Without venturing into a dissertation on situation ethics, I am satisfied to say that lawyers and accountants have a higher call to duty than that of acting to prevent the production of evidence through the use of a privilege under the circumstances here. The privilege is designed to protect a client's confidences imparted during the attorney-client relationship.

The privilege does not exist, however, for the purpose of being used initially and directly as a strategem or device to place pre-existing documentary evidence beyond the reach of the law. While conceding this, the majority in the same breath uses the attorney-client relationship in a futile effort to establish an expectation of privacy to satisfy one of the requirements of Couch *v.* United States, 1973, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548.

In *Couch,* a taxpayer was not allowed the Fifth Amendment privilege against self-incrimination even as to her own records in the hands of her accountant. The court stated that the two essential bases for the privilege were absent: no legitimate expectation of personal privacy in the records, and no governmental compulsion against the person of the taxpayer.

Where is taxpayer's expectation of personal privacy in the accountant's records here? What compulsion is there against the person of the taxpayer in a summons against his lawyer to produce an accountant's records which were for a fleeting moment placed in the hands of the taxpayer by the accountant. An expectation of personal privacy of the *Couch* type cannot be generated *ipso facto* by creating a lawyer-client relationship. I would therefore pretermit further consideration of the element of compulsion.

Moreover, it would appear that the majority opinion may conflict with our decision in United States *v.* White, 5 Cir., 1973, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335. The only possible difference between this case and *White* is that the accountant's records in *White,* reflecting, as here, the affairs of the taxpayer, were transferred directly from the accountant to the lawyer. We held that there was no Fifth Amendment privilege to be exercised for the taxpayer by his lawyer in the accountant's records.

I did not join in *White* on the narrow basis of exalting form over substance to the extent of reserving a different holding for a set of facts where the same records had passed through the hands of the taxpayer.

For the reasons stated I would affirm the district court to the end of enforcing the summons.

APPENDIX C

United States Court of Appeals for the Fifth Circuit
October Term, 1973

No. 73–1973

D.C. Docket No. CA 3–6973–D

UNITED STATES OF AMERICA AND JAMES S. MABREY, SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLEES

v.

C. D. KASMIR AND JERRY A. CANDY,

DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Northern District of Texas

Before BELL, THORNBERRY and DYER, Circuit Judges

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

It is further ordered that each party bear his own costs on appeal in this Court.

August 21, 1974

BELL, Circuit Judge, dissenting.

Issued as Mandate: October 7, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 18, 1974
CERTIORARI GRANTED JANUARY 27, 1975

INDEX

	Page
Docket Entries in District Court	1
Petition to Enforce Internal Revenue Service Summons	4
Exhibit A—Affidavit of James S. Mabrey	7
Exhibit B—Summons to C. D. Kasmir	9
Exhibit C—Summons to Jerry A. Candy	11
Order to Show Cause	13
Response to Order to Show Cause and Motion to Quash Summons	14
Exhibit A—Statement of Jerry A. Candy	22
Exhibit B—Statement of Cyril David Kasmir	23
Exhibit C—Employment Agreement between Cyril David Kasmir and Jerry A. Candy	24
Exhibit D—Receipt for records, signed by Dr. E. J. Mason	27
Hearing Memorandum of Points and Authorities, filed by respondents	28
Trial Memorandum of Law of the United States	30
Transcript of March 28, 1973, Hearing on Petition to Enforce Internal Revenue Service Summons	36
Testimony of James S. Mabrey	39
Testimony of Jerry A. Candy	50
Testimony of C. D. Kasmir	60
Government Exhibit 1, Summons to Jerry A. Candy	81
Government Exhibit 2, Summons to C. D. Kasmir	83
Government Exhibit 3, Statement of Jerry A. Candy	85
Government Exhibit 4, Statement of Cryil David Kasmir	86
Government Exhibit 5, Power of Attorney	87
Government Exhibit 6, Receipt for records, signed by Dr. E. J. Mason	89
Government Exhibit 7, Employment Agreement between Cryil David Kasmir and Jerry A. Candy	90
Order—March 28, 1973	93
Motion for Stay	94
Order Granting Stay	95
Respondents' Bond	
Notice of Appeal	96
Order Allowing Certiorari	97

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

Title of Case	*Attorneys*
UNITED STATES OF AMERICA and JAMES S. MABREY, Special Agent of the Internal Revenue Service vs C.D. KASMIR and JERRY A. CANDY	For plaintiff: Frank McCown, USAtty Ken J. Mighell, AUSAtty For defendant: Akin, Gump, Strauss, Hauer & Feld Edward A. Copley 2800 Republic Nat'l Bank Bldg. Dallas, Tx 75201 741-2111 -and- Cyril David Kasmir, Pro Se 601 Kirby Bldg. Dallas, Tx 75201 744-5511

Statistical Record	*Date 1973*	*Name or Receipt No.*	*Rec.*	*Disb.*
J.S. 5 mailed Not mailed	3-21	US		
J.S. 6 mailed (Cleared 3-73)	4-16	F. R. Kasmir (appeal)	5.00	
Basis of Action: Petition to enforce Internal Revenue Service Summons, Section 7402(b) & 7604(a) of Internal Revenue Code of 1954.	4-20	SF 201-430		5.00

1973	*Proceedings*	*Date Order or Judgment Notes*
Mar. 21	Filed PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS and issued SUMMONS (2).	
Mar. 21	Filed ORDER TO SHOW CAUSE, appear 3-28-73 at 9:00 am. & Issued WRIT (2).	RMH
Mar. 26	Filed MARSHALS RETURN ON WRIT (2) executed 3-22-73 by serving C. D. Kasmir; & by serving James A. Candy.	
Mar. 27	Filed Defendant's RESPONSE TO ORDER TO SHOW CAUSE & MOTION TO QUASH SUMMONS.	
Mar. 28	Filed Defendant's HEARING MEMORANDUM OF POINTS & AUTHORITIES.	
Mar. 27	Filed TRIAL MEMORANDUM OF LAW OF THE UNITED STATES.	
Mar. 28	Filed ORDER that C. D. Kasmir and Jerry A. Candy obey summonses served upon them by appearing before Special Agent Mabrey on April 16, 1973, at 10:00 A.M. Copies to counsel of record.	RMH
Apr. 6	Filed Respondents' MOTION FOR STAY.	
Apr. 6	Filed ORDER GRANTING STAY. The execution of any proceedings to enforce the Order entered March 28, 1973, is stayed pending determination of Respondents' appeal, provided the Respondents post a cash deposit in the sum of $250.00 in lieu of a bond, on or before April 9, 1973. Copies mailed to counsel.	RMH
Apr. 16	Filed RESPONDENT'S BOND that they have deposited with the registry of the U.S. Clerk at Dallas the sum of 250.00 cash on April 6, 1973, pursuant to the Order of the Court.	

Apr. 16	Filed NOTICE OF APPEAL by Defendants from the Order directing the Defendants to obey the summons served upon them by Special Agent Mabrey entered on March 28, 1973. (copy mailed to Court of Appeals, & given to Ken Mighell by hw)	
**		
Apr. 23	Filed TRANSCRIPT OF PROCEEDINGS held March 28, 1973 with exhibits: GX-1 thru 7	
Apr. 23	Mailed record to Court of Appeals with Transcript of Proceedings and listed exhibits.	
Apr. 20**	Filed RESPONDENT'S BOND FOR COSTS ON APPEAL ($250.00)	
Apr. 20**	Filed Letter to Clerk from Cyril Kasmir requesting transcript of proceedings.	
Apr. 24	Mailed supplemental record to Court of Appeals (Respondent's Bond for Costs on Appeal)	

Certified a true copy of an instrument
on file in my office on April 24, 1973
Joseph XXXXX, Jr., Clerk, U.S. District
Court, Northern District of Texas
By Rosemary Edmeston Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA and JAMES S. MABREY, Special Agent of the Internal Revenue Service, PETITIONERS	CIVIL ACTION No. CA-3-6973-D
v.	
C. D. KASMIR and JERRY A. CANDY, RESPONDENTS	

(Filed: March 21, 1973)

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

The United States of America and James S. Mabrey, Special Agent of the Internal Revenue Service, by their attorney, Frank D. McCown, United States Attorney for the Northern District of Texas, show unto this Court as follows:

I

This is a proceeding brought under the authority of Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 to judicially enforce two Internal Revenue Service summonses.

II

The petitioner, James S. Mabrey, is a Special Agent of the Internal Revenue Service, employed in the Intelligence Division of the Office of the District Director of Internal Revenue in Dallas, Texas.

III

(a) The respondent, C. D. Kasmir, maintains an office at 601 Kirby Building, Dallas, Texas.

(b) The respondent, Jerry A. Candy, maintains an office at 1407 Main, Suite 1422, Dallas, Texas.

IV

Special Agent James S. Mabrey is conducting an investigation for the purpose of ascertaining the correctness of income tax returns filed by Edward J. Mason and Rae A. Mason for the years 1969 through 1971, as is set forth in the affidavit of Special Agent James S. Mabrey attached hereto as Exhibit A.

V

The respondents, C. D. Kasmir and Jerry A. Candy, are in possession and control of testimony and documents concerning the above-described investigation.

VI

On January 5, 1973, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit B, was issued by the petitioner, James S. Mabrey, directing the respondent, C. D. Kasmir, to appear before the said James S. Mabrey, on January 15, 1973 at 9:00 a.m., at Room 11G47, 1100 Commerce, Dallas, Texas, to testify and to produce for examination books, records and other papers, all of which are fully described in the summons attached hereto as Exhibit B. A copy of this summons was personally served on C. D. Kasmir, on January 5, 1973, as is set out in the affidavit of the petitioner, James S. Mabrey, attached hereto as Exhibit B.

VII

On January 5, 1973, an Internal Revenue Service summons, a copy of which is attached hereto as Exhibit C, was issued by the petitioner, James S. Mabrey, directing the respondent, Jerry A. Candy, to appear before the said James S. Mabrey, on January 15, 1973 at 9:00 a.m., at Room 11G47, 1100 Commerce, Dallas, Texas, to testify. A copy of this summons was personally served on Jerry A. Candy, on January 5, 1973, as is set out in the affidavit of the petitioner, James S. Mabrey, attached hereto as Exhibit B.

VIII

On January 5, 1973, the respondents, C. D. Kasmir and Jerry A. Candy, appeared but refused to comply with the

summonses by testifying or by producting the books, records and other documents demanded in the summonses. The respondents' refusal to comply with the summonses continues to date as is set forth in the affidavit of James S. Mabrey, attached hereto as Exhibit A.

WHEREFORE, the petitioners, the United States of America and James S. Mabrey, respectfully pray:

1. That this Court enter an order directing the respondents, C. D. Kasmir and Jerry A. Candy, to show cause, if any they have, why they should not comply with and obey the summonses attached hereto as Exhibits B and C in each and every requirement thereof;

2. That this Court enter an order directing the respondents, C. D. Kasmir and Jerry A. Candy, to obey the summonses attached hereto as Exhibits B and C in each and every requirement thereof by ordering the attendance and production of the records as is required and called for by the terms of the summonses before the petitioner, James S. Mabrey, or any other proper officer of the Internal Revenue Service, at such time and place as hereafter may be fixed by the petitioner, James S. Mabrey, or any other proper officer of the Internal Revenue Service, and by ordering the respondents, C. D. Kasmir and Jerry A. Candy, to appear for the purpose of giving testimony concerning the tax liability of Edward J. Mason and Rae A. Mason as to each or any of the years 1969 through 1971; and

3. That this Court grant such other and further relief as it deems just and proper.

FRANK D. McCOWN
United States Attorney

By: s/ Kenneth J. Mighell
Assistant United States Attorney

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA and JAMES S. MABREY, Special Agent of the Internal Revenue Service, PETITIONERS v. C. D. KASMIR and JERRY A. CANDY,	CIVIL ACTION No.

AFFIDAVIT OF JAMES S. MABREY

STATE OF TEXAS. }
COUNTY OF DALLAS } SS

JAMES S. MABREY, being first duly sworn, deposes and says:

1. He is a Special Agent employed in the Intelligence Division of the Office of the District Director of Internal Revenue at Dallas, Texas.

2. In his capacity as a Special Agent, he is conducting an investigation for the purpose of ascertaining the correctness of income tax returns filed by Edward J. Mason and Rae A. Mason, for the years 1969 through 1971.

3. As a part of the above investigation, on January 5, 1973, he issued an Internal Revenue Service summons to C. D. Kasmir, directing him to appear before him on January 15, 1973, to testify and to produce for examination the following records:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
3. Retained copies of reports and other correspondence between Tannenbaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

A copy of this summons is attached to these pleadings as Exhibit B.

4. As part of the above investigation, on January 5,

1973, he issued an Internal Revenue Service summons to Jerry A. Candy directing him to appear before him on January 15, 1973 to testify. A copy of this summons is attached to these pleadings as Exhibit C.

5. On January 5, 1973, the petitioner, Special Agent James S. Mabrey, served the Internal Revenue Service summonses described in paragraphs 3 and 4 above on the respondents, C. D. Kasmir and Jerry A. Candy, by personally handing a copy to each of them.

6. On January 15, 1973, the respondents, C. D. Kasmir and Jerry A. Candy, appeared but refused to comply with the summonses by producing the books, records and other documents demanded in the summonses or by giving testimony as to the matters requested in said summonses. The respondents' refusal to comply with the summonses continues to the date of this affidavit.

7. It is necessary to examine the books, records and other papers demanded by the summonses and to take the testimony of C. D. Kasmir and Jerry A. Candy, on order to ascertain the correctness of income tax returns filed by Edward J. Mason and Rae A. Mason, for the years 1969 through 1971.

s/ James S. Mabrey
AFFIANT

Subscribed and Sworn to before me, this 12th day of March, 1973

s/ Bonnie J. Wilcox
NOTARY PUBLIC in and for said
State and County.

My Commission expires:

(SEAL)

SUMMONS

In the matter of the tax liability of
EDWARD J. and RAE A. MASON
2516 Forest Ave. (or)
2207 Millermore, Dallas, Texas

Internal Revenue District of Dallas, Texas

Period(s) 1969, 1970, and 1971

The Commissioner of Internal Revenue

To C. D. Kasmir
At Fishman and Associates, Dallas, Texas

Greetings: You are hereby summoned and required to appear before James S. Mabrey, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

the following records of Tannebaum Bindler & Lewis.

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971.

Place and time for appearance:

at Room 11G47, 1100 Commerce, Dallas, Texas on the 15th day of January, 1973 at 9:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 5 day of January, 1973

James S. Mabrey — Special Agent
Signature — Title

EXHIBIT B

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7503, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date 1-5-73 Time 0905

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed,

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature James S. Mabrey Title Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

SUMMONS

In the matter of the tax liability of
EDWARD J. and RAE A. MASON
2516 Forest Ave. (or)
2207 Millermore, Dallas, Texas

Internal Revenue District of Dallas, Texas

Period(s) 1969, 1970, and 1971

The Commissioner of Internal Revenue

To Jerry A. Candy
Tannebaum Bindler & Lewis
At Dallas, Texas

Greetings: You are hereby summoned and required to appear before James S. Mabrey, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Testimony.

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971.

Place and time for appearance:

at Room 11G47, 1100 Commerce, Dallas, Texas on the 15th day of January, 1973 at 9:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 5 day of January, 1973

James S. Mabrey — Special Agent
Signature — Title

EXHIBIT C

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7503, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
1-5-73	0905

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed,

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature James S. Mabrey Title Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Order to Show Cause

(Number and title omitted) (Filed: March 21, 1973)

Upon the Petition, the Exhibit attached hereto, the Affidavit of James S. Mabrey, Special Agent of the Internal Revenue Service, and upon the motion of Frank D. McCown, United States Attorney for the Northern District of Texas:

It Is Ordered that C. D. Kasmir and Jerry A. Candy appear before the District Court of the United States for the Northern District of Texas, in that branch thereof presided over by the undersigned, in his courtroom in the United States Courthouse in Dallas, Texas, on March 28, 1973, at 9:00 A.M., to show cause why they should not be compelled to testify and produce the records demanded in the Internal Revenue Service summonses served upon them on January 5, 1973, by the petitioner, Special Agent James S. Mabrey.

LET A COPY OF THIS ORDER, together with the Petition and the Exhibits attached thereto be served upon C. K. Kasmir and Jerry A. Candy, on or before March 22, 1973.

IT IS FURTHER ORDERED that said respondents shall file a written response to said Petition within five (5) days after service of said Petition and attached Exhibits.

DATED at Dallas, Texas, this 21 day of March, 1973.

s/ Robert M. Hill
UNITED STATES DISTRICT JUDGE

Response to Order to Show Cause and Motion to Quash Summons

(Number and title omitted) (Filed: March 27, 1973)

Now come C. D. KASMIR and JERRY A. CANDY, the Respondents herein, and in response to the Petition to Enforce Internal Revenue Service Summons filed herein and in response to the Order to Show Cause in this proceeding would show unto this Court the following:

1. The Respondents neither admit nor deny the allegations contained in Paragraph I of the Petition to Enforce Internal Revenue Summons.

2. The Respondents admit the allegations contained in Paragraph II of the said Petition.

3. (a) The Respondents admit the allegations contained in Sub-paragraph (a) of Paragraph III of the said Petition. (b) The Respondents deny the allegations contained in Sub-paragraph (b) of Paragraph III of the said Petition and allege that the firm of Tannebaum, Bindler & Lewis maintains an office at such address, and that such firm employs the Respondent, JERRY A. CANDY, as an employee.

4. The Respondents deny the allegations contained in Paragraph IV of the said Petition for lack of knowledge or information sufficient to form a belief as to the truth or accuracy thereof.

5. The Respondents deny the allegations contained in Paragraph V of the said Petition.

6. The Respondents admit the allegations contained in Paragraph VI of the said Petition, except they deny all allegations set forth in the affidavit of the Petitioner, JAMES S. MABREY, not specifically admitted herein.

7. The Respondents admit the allegations contained in Paragraph VII of the said Petition, except they deny all allegations set forth in the affidavit of the Petitioner, JAMES S. MABREY, not specifically admitted herein.

8. The Respondents admit the allegations contained in Paragraph VIII of the said Petition, except they deny the accuracy of the date "January 5, 1973" and allege that such date should read "January 15, 1973."

9. For further defense to the said Petition filed herein, the Respondents state the following:

(a) On January 5, 1973, the Respondent JERRY A. CANDY was served with a Summons, a copy of which is attached to the said Petition as Exhibit "C". The Summons ordered him to appear before JAMES S. MABREY, an officer of the Internal Revenue Service, to give testimony . . . and to produce for examination the following:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

(b) The Respondent JERRY A. CANDY, in response to the Summons, appeared and, by means of a written statement, a copy of which is marked as Exhibit "A", is attached hereto and is incorporated herein, explained and now alleges that at the time he was served with the Summons he did not possess any of the above-described documents. He also explained and now alleges that prior to the time he was served with the Summons and in response to the direction and request of DR. EDWARD J. MASON, and in compliance with the direction of his employer, SAMUEL H. TANNEBAUM, he delivered all of the above-described documents to DR. EDWARD J. MASON.

(c) On January 5, 1973, the Respondent CYRIL DAVID KASMIR was served with a Summons, a copy of which is attached to the said Petition as Exhibit "B". The Summons ordered him to appear before JAMES S. MABREY, an officer of the Internal Revenue Service, to give testimony . . . and to produce for examination:

the following records of Tannebaum, Bindler & Lewis.

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

(d) The Respondent, CYRIL DAVID KASMIR, in response to the Summons, appeared and, by means of a

written statement, a copy of which is marked as Exhibit "B", is attached hereto and is incorporated herein, explained and now alleges that he had been employed by the taxpayers to represent them with respect to their income tax liability for the years 1969, 1970 and 1971, in connection with the audit of their income tax returns and examination presently being made by the Internal Revenue Service and that, by virtue of said employment, he refused to answer any questions . . . based on the attorney-client privilege. He further explained and now alleges that he refused to produce any documents, books, records or papers based upon the Fourth Amendment's protection against unreasonable searches and seizures and upon the Fifth Amendment's privilege against self-incrimination asserted at the direction of and on behalf of the taxpayers.

(e) On Wednesday, January 3, 1973, which was prior to the date of the service of the Summons, the taxpayers employed the Respondent CYRIL DAVID KASMIR, who is a duly licensed and practicing attorney and a member of The State Bar of Texas, to represent them as legal counsel in connection with matters involving their federal income taxes for the years 1969, 1970 and 1971.

(f) On that same day, Wednesday, January 3, 1973, the Respondent CYRIL DAVID KASMIR, acting in his capacity as attorney for the taxpayers, employed the Respondent JERRY A. CANDY to assist him in analyzing the books, records, papers and documents of the taxpayers. A copy of the Employment Agreement is marked Exhibit "C", is attached hereto and is incorporated herein.

(g) On Thursday, January 4, 1973, which was prior to the date of the service of the Summons, at the direction and request of DR. EDWARD J. MASON and in compliance with the direction of his employer, SAMUEL H. TANNEBAUM, the Respondent JERRY A. CANDY delivered the following files to DR. EDWARD J. MASON: 1969, 1970 and 1971 Tax Files, Quarterly Tax Files, Bookkeeping Files, 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements, which included work papers prepared by the accountants and all books, records and other documents in the possession of the said accountants that related to the taxpayers. At the time of delivery, DR. EDWARD J. MASON executed a letter that was, by its terms, to serve as a receipt for the documents. The letter is marked Exhibit "D", is attached hereto and is incorporated herein. The letter is incorrectly dated January 3, 1973. These files and other documents were delivered to DR. EDWARD J. MASON on January 4, 1973, and the letter was signed by DR. EDWARD J. MASON on January 4, 1973. It was the understanding of the Respondent JERRY A. CANDY, at the time of the delivery to DR. EDWARD J. MASON on January 4, 1973, that he was relinquishing to the taxpayer the rightful, indefinite and legitimate possession of the said documents and files. Since that time, the said files and the other said books, records and documents have not been in the possession of the Respondent JERRY A. CANDY.

(h) For the years 1969, 1970 and 1971, the taxpayers had employed the firm of Tannebaum, Bindler & Lewis, Certified Public Accountants, to prepare their federal income tax returns. The firm of Tannebaum, Bindler & Lewis did prepare the taxpayers' federal income tax returns for the years 1969, 1970 and 1971. The Respondent JERRY A. CANDY, a Certified Public Accountant, became an employee of the firm of Tannebaum, Bindler & Lewis in December, 1971. The Respondent JERRY A. CANDY did not prepare the taxpayers' federal income tax returns for the years 1969 and 1970 and never had possession or control over any of the work papers relating thereto, except to deliver them to DR. EDWARD J. MASON at the direction of DR. EDWARD J. MASON and at the direction of his employer SAMUEL H. TANNEBAUM. The records for the year 1971 did not belong to the Respondent JERRY A. CANDY by virtue of the fact that he was merely an employee of Tannebaum, Bindler & Lewis.

(i) Since the time of the delivery by the Respondent JERRY A. CANDY to the taxpayer, DR. EDWARD J. MASON, the said files and the other said books, records and documents have been in the possession of the taxpayer, DR. EDWARD J. MASON, or his attorney, the Respondent, CYRIL DAVID KASMIR.

(j) On Thursday, January 4, 1973, the taxpayer, DR. EDWARD J. MASON, delivered the above-described files and papers and various other books, documents, bank statements, cancelled checks and records to the Respondent CYRIL DAVID KASMIR and since that time they have been and now are in the possession of the Respondent CYRIL DAVID KASMIR.

(k) The Respondent CYRIL DAVID KASMIR is counsel

for the taxpayers. Therefore, once again, he respectfully declines to give testimony based on the attorney-client privilege.

(l) Further, the Respondent CYRIL DAVID KASMIR has been directed by his clients, the taxpayers, to assert their rights and privileges under the Fifth Amendment to the Constitution of the United States. Therefore, once again, he respectfully declines to produce the above-described documents for the reason that evidence contained in such documents may tend to incriminate the taxpayers and might be used as evidence against them in criminal proceedings for the possible violation of the Internal Revenue laws of the United States in violation of the taxpayers' rights under the Fifth Amendment to the Constitution of the United States.

(m) Further, the Respondent, CYRIL DAVID KASMIR has been directed by his clients, the taxpayers, to assert their rights and privileges under the Fourth Amendment to the Constitution of the United States. Therefore, once again, he respectfully declines to produce the above-described documents for the reason that the government's attempt to obtain production amounts to an unreasonable search and seizure is in violation of the taxpayers' rights under the Fourth Amendment to the Constitution of the United States.

(n) The Respondent JERRY A. CANDY respectfully declines to give testimony as to information and facts, if any, acquired by him prior to January 3, 1973, based on the accountant-client privilege.

(o) The Respondent JERRY A. CANDY was employed on January 3, 1973, by the Respondent CYRIL DAVID KASMIR, counsel for the taxpayers, to assist him in analyzing the books, records, papers and documents of the taxpayers and the business, financial and personal affairs of the taxpayers insofar as he may deem such assistance to be necessary in the preparation and presentation of the taxpayers' case. Therefore, he respectfully declines to give testimony as to information and facts, if any, acquired by him subsequent to his employment based on the attorney-client privilege.

(p) The Respondents further state that if the Summons served on them are enforced, a violation of the accountant-client privilege, of the attorney-client privilege and of the

taxpayers' Constitutional rights and privileges granted them under the Fourth Amendment and under the Fifth Amendment to the Constitution of the United Sates would result, and that the said Summons are therefore unconstitutional and void in that they violate the aforesaid rights and privileges of the taxpayers.

WHEREFORE, RESPONDENTS PRAY:

(1) That the Summons served upon each of them on January 5, 1973, filed as Exhibit "B" and Exhibit "C" to the Petition to Enforce Internal Revenue Summons filed herein, be quashed and vacated and held for naught;

(2) That the Petition to Enforce Internal Revenue Service Summons be dismissed;

(3) That the Order to Show Cause issued by this Court on March 21, 1973, be vacated and discharged and that the Respondents be exonerated therefrom; and

(4) For such other and further relief as may appear to be proper in the circumstances.

AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Building
Dallas, Texas 75201
741-2111

By s/ Edward A. Copley
EDWARD A. COPLEY
ATTORNEY FOR THE RESPONDENTS

FISCHMAN, ROSENBERG, KASMIR
& WILLINGHAM
601 Kirby Building
Dallas, Texas 75201
744-5511

By s/ Cyril David Kasmir
CYRIL DAVID KASMIR
PRO SE

THE STATE OF TEXAS
COUNTY OF DALLAS

CYRIL DAVID KASMIR, the Respondent herein, after being first duly sworn, deposes and states that he had read the foregoing Response to Order to Show Cause and Motion to Quash Summons and that he knows the contents contained in Paragraphs 9(c), 9(d), 9(e), 9(f), 9(i), 9(j),

9(k), 9(l), 9(m) and 9(p) and that he knows that the facts stated in Paragraphs 9(c), 9(d), 9(e), 9(f), 9(i), 9(j), 9(k), 9(l), 9(m) and 9(p) are true.

s/ Cyril David Kasmir
CYRIL DAVID KASMIR
RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME, A Notary Public in and for Dallas County, Texas, by the said CYRIL DAVID KASMIR on this the 27th day of March, 1973, to certify which witness my hand and seal of office.

s/ Cyril David Kasmir
NOTARY PUBLIC IN AND FOR
DALLAS COUNTY, TEXAS

My Commission Expires:
June 1, 1973.

(SEAL)

THE STATE OF TEXAS
COUNTY OF DALLAS

JERRY A. CANDY, the Respondent herein, after being first duly sworn, deposes and states that he has read the foregoing Response to Order to Show Cause and Motion to Quash Summons and that he known the contents contained in Paragraphs 9(a), 9(b), 9(f), 9(g), 9(h), 9(n), 9(o) and 9(p) and that he knows that the facts stated in Paragraphs 9(a), 9(b), 9(f), 9(g), 9(h), 9(n), 9(o) and 9(p) are true.

s/ Jerry A. Candy
JERRY A. CANDY
RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for Dallas County, Texas, by the said

JERRY A. CANDY on this the 27 day of March, 1973, to certify which witness my hand and seal of office.

s/ Doris K. Cupples
NOTARY PUBLIC IN AND FOR
DALLAS COUNTY, TEXAS

My Commission Expires:
June 1, 1973.

(SEAL)

At the time I was served with the Summons by Special Agent James S. Mabrey of the Internal Revenue Service I did not possess any of the following records of Tannebaum, Bindler & Lewis:

(1) Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.
(2) Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.
(3) Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

Prior to the time that I was served with the Summons and in response to the request of Dr. Edward J. Mason, I delivered all of the above-described documents to Dr. Edward J. Mason.

I am presently in the employ of the lawfirm of Fischman, Rosenberg & Kasmir to assist them in analyzing the books, records, papers and documents of Dr. Edward J. and Rae A. Mason and the business, financial and personal affairs of the said Masons insofar as the said Attorneys may deem such assistance to be necessary in the preparation and presentation of the Mason's case. In this capacity, I respectfully refuse to answer any questions at this time based on the attorney-client privilege.

Jerry A. Candy, C.P.A.

Dated: January 15, 1973

EXHIBIT A

On January 3, 1973, I was employed by Dr. Edward J. and Rae A. Mason to represent them with respect to their income tax liability for the years 1969, 1970 and 1971, in connection with the audit of their income tax returns and examination presently being made by the Internal Revenue Service.

By virtue of said employment, I respectfully refuse to answer any questions at this time based upon the attorney-client privilege.

Furthermore, on behalf of my clients, I respectfully refuse to produce any documents, books, records or papers at this time based upon the Fourth Amendment's protection against unreasonable searches and seizures and upon the Fifth Amendment's privilege against self-incrimination.

Cyril David Kasmir
Attorney at Law

Dated: January 15, 1973

EXHIBIT B

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT entered into at Dallas, Texas this 3rd day of January, 1973, by and between CYRIL DAVID KASMIR (hereinafter referred to as "the Attorney") and JERRY A. CANDY (hereinafter referred to as "the Accountant").

WITNESSETH:

WHEREAS, the Attorney has been employed by DR. EDWARD J. and RAE A. MASON (hereinafter referred to as the "Clients") to represent them in the matter of their federal income tax liabilities for the years 1969, 1970 and 1971, in connection with an audit of their income tax returns presently being made by the Internal Revenue Service, and

WHEREAS, in carrying out his duties and responsibilities pursuant to such employment the Attorney will require accounting assistance in analyzing the books, records, papers and documents which have been delivered to him by the Clients and to have accounting assistance in preparing schedules, workpapers and other documents which when prepared will represent the product of the Attorney's work in preparing and presenting the case of the Clients.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and undertakings hereinafter set forth, the Attorney and Accountant do hereby agree as follows:

1. The Attorney employs the Accountant to assist the Attorney in analyzing the books, records, papers and documents of the Clients and the business, financial and personal affairs of the Clients insofar as the Attorney may deem such assistance to be necessary in the preparation and presentation of the Client's case.

2. The Attorney agrees to pay the Accountant a reasonable fee for all such services actually rendered and performed by the Accountant pursuant to the Attorney's request.

3. (a) All books of account, records, papers and other documents belonging to the Clients and all memoranda, workpapers or other documents prepared by the Attorney which pertain to the affairs of the Clients which may be delivered by the Attorney to the Accountant in the course of the Accountant's employment shall be and remain the property of the Clients or the Attorney, as the case may be, and the Accountant shall be the gratuitous bailee thereof.

(b) All notes, workpapers, schedules, analyses and other documents prepared by the Accountant for use by the Attorney in the presentation of the Clients' case shall become the property of the Attorney immediately upon their preparation by the Accountant, whether or not such documents are complete or incomplete and irrespective of who purchased or paid for the component parts thereof, in the same manner and to the sane extent as though such documents had been prepared by the Attorney and the component parts thereof purchased and paid for by the Attorney, and the Accountant shall be the gratuitous bailee thereof.

(c) Under no circumstances shall the accountant permit anyone other than the Attorney to examine, inspect or copy or take possession of any of the records and documents referred to in paragraphs 3(a) and 3(b) hereof.

4. The bailment to the Accountant of all records and documents referred to in paragraph 3 above shall be automatically revoked and the Accountant shall at once deliver to the Attorney all such records and documents upon the happening of any one of the following events:

(a) A request by the Attorney for the return of such records and documents;

(b) The exhibition to or surrender of any of such records and documents by the Accountant to anyone other than the Attorney;

(c) A request by anyone other than the Attorney (including, but without being limited to, a creditor of the Clients and a representative of any agency of the United States Government) to examine, inspect or copy any of such records and documents, or for the possession of any of such records and documents;

(d) Any attempt to serve, or the actual service of, any court order, subpoena or summons, or any administrative subpoena or summons upon the Accountant which requires or purports to require him to produce any of such records and documents.

5. Should any litigation result from the failure or refusal of the Accountant to comply with the requests, orders, subpoenas or summons referred to in paragraphs 4(c) and 4(d) hereof, the Attorney agrees, if requested by the Accountant, to defend the Accountant in such litigation at the Attorney's cost and expense.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto the day and year first above written.

CYRIL DAVID KASMIR
ATTORNEY

JERRY A. CANDY
ACCOUNTANT

January 3, 1973

Tannebaum, Bindler & Lewis
1422 Metropolitan Savings Building
Dallas, Texas 75202

Gentlemen:

Please accept this as receipt for the following files of Dr. E. J. Mason: 1969, 1970 and 1971 Tax Files, Quarterly Tax Files, and Bookkeeping Files. 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements.

Dr. E. J. MASON

EXHIBIT D

(Number and title omitted) (Filed: March 28, 1973)

The Respondent, CYRIL DAVID KASMIR and JERRY A. CANDY, are attempting to prevent judicial enforcement of two Summons issued by the Internal Revenue Service that were directed to them.

1. Petitioner JAMES S. MABREY, a Special Agent of the Intelligence Division of the Internal Revenue Service, is conducting a criminal investigation of the taxpayers. He has advised the taxpayer of his Constitutional rights. Mabrey is investigating whether taxpayer "reported all of his income". The failure to report income is a felony. See Section 7201 of the Internal Revenue Code of 1954.

2. The taxpayers have the right to withhold papers in their possession in a criminal investigation by virtue of the Fifth Amendment. See *Stuart v. United States,* 416 F.2d 459 (C.A. 5, 1969); *United States v. Cohen,* 338 F.2d 464 (C.A. 9, 1967); *United States v. Judson,* 322 F.2d 460 (C.A. 9, 1963), *Couch v. United States* (Decision: January 9, 1973).

3. Taxpayer exercised his constitutional right to consult an attorney and to seek his counsel and advice. He obtained and followed the attorney's advice. The attorney-client relationship, a confidential relationship, provided taxpayer a legitimate expectation of protected privacy and confidentiality. Taxpayer does not lose his constitutional rights and privileges because he retains counsel and delivers privileged papers to him.

See *United States v. Judson,* 322 F.2d 460 (C.A. 9, 1963); *Couch v. United States* (Decision: January 9, 1973).

4. All the activity complained of by the Government took place *before* the Summons were served. The rights and obligations of the parties did not become fixed until the Summons were served. See *Couch v. United States* (Decision: January 9, 1973). The case of *United States v. Zakutansky,* 401 F.2d 68 (C.A. 7, 1968), cited by the Government, involves the transfer of papers by an accountant after he had been served with Summons. *Zakutansky* is cited by the Supreme Court in *Couch* for the rule stated above. The case of *United States v. Baldridge,* 281 F. Supp. 470 (SD Tex., 1968), cited by the Government, holds that the rights and obligations of the parties became fixed at "the institution of an income tax evasion" and not, as the Supreme Court ruled in *Couch,* at the time the Summons was served.

5. Possession, not ownership, bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw meaningless line. See *Couch v. United States* (Decision: January 9, 1973). In the cases of *Deck v. United States,* 339 F.2d 739 (C.A.D.C., 1964), cert. den. 379 U.S. 967 (1965) and *United States v. White,* 326 F. Supp. 459 (S.D. Tex., 1971) cited by the Government, the Court found a lack of ownership and, therefore, denied the privilege. *Couch* specifically rejects the requirement of ownership as a basis for the privilege.

6. The attorney for the taxpayers, the Respondent CYRIL DAVID KASMIR, in possession of the papers, can assert the attorney-client privilege and his client's constitutional rights under the Fourth and Fifth Amendments. See *United States v. Judson,* 322 F.2d 460 (C.A. 9, 1963); *Colton v. United States,* 306 F.2d 633 (C.A. 2, 1962); *Brody v. United States,* 243 F.2d 378 (C.A. 1, 1957); *Application of House,* 144 F. Supp. 95 (N.D. California, 1956); *United States v. Foster, Lewis, Langley & Onion,* 65-1 U.S.T.C. Par. 9418 (W.D. Tex., 1964).

It is respectfully submitted that this Court should deny the enforcement of the Summons sought by the Government and that it should grant the relief prayed for by the Respondents in their Response to Order to Show Cause and Motion to Quash Summons.

AKIN GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank
Building
Dallas, Texas 75201
741-2111

By s/ Edward A. Copley
EDWARD A. COPLEY

ATTORNEY FOR THE RESPONDENTS

FISCHMAN, ROSENBERG, KASMIR &
WILLINGHAM
601 Kirby Building
Dallas, Texas 75201
744-5511

By s/ Cyril David Kasmir
CYRIL DAVID KASMIR
PRO SE

TRIAL MEMORANDUM OF LAW OF THE UNITED STATES

(Number and title omitted) (Filed: March 27, 1973)

In this action the United States is attempting to secure judicial enforcement of two of its Internal Revenue summonses directed, respectively, to each of the respondents.

FACTS

1. The taxpayers under investigation by the Intelligence Division, IRS, are Edward J. and Rae A. Mason; the years under investigation are 1969 through 1971.

2. Mason was first contacted by Intelligence on January 3, 1973, at which time Special Agent Mabrey identified himself and gave the taxpayer his constitutional rights. At that time Mabrey requested permission to inspect Mason's records.

Mason voluntarily telephoned Candy, his accountant and one of the respondents herein, to tell him that his permission had been granted to the agent; at the conclusion of that telephone call Mason indicated to Mabrey that Candy had advised him to terminate the interview and *not* to furnish any records.

Shortly thereafter Mason received a telephone call purportedly from his attorney, Kasmir, the other respondent in this case. At the conclusion of that call Mason told Mabrey that he would not answer any more questions or furnish any records to him.

3. One day later Mabrey contacted Candy in an attempt to gain permission to examine the latter's work papers and to talk to him about the tax returns under investigation; Candy replied that the records were now in the possession of Kasmir (having been moved over after the telephone conversations described in paragraph 2).

4. Still one day later, on January 5th, the summonses at issue were served on both Candy and Kasmir.

5. On January 15th, in response to the summonses directed to them, Candy and Kasmir appeared but refused to testify and refused to turn over any records. Candy refused to answer any questions because, he stated, he was now employed by Kasmir; he invoked the attorney-client privilege.

Kasmir declined to produce the records and answer any questions on the grounds of the attorney-client privilege as well as the Fourth and Fifth Amendment privileges.

6. Mabrey requires the summoned records, i.e., accountant's work papers, retained copies of Mason's income tax returns and retained copies of reports and other correspondence, all for the years 1969 through 1971, in order to determine if Mason has reported all of his income. Since Mason himself has declined to produce his own records or to give any testimony the sought materials are vital to the instant investigation.

QUESTION PRESENTED

Is the Fourth or Fifth Amendment a bar to enforcement of the subject summonses?[1]

LEGAL DISCUSSION

I

There exists no Constitutional privileges barring production of the summoned documents

The United States Supreme Court recently decided the case of *Couch v. United States* (Decision: Jan. 9, 1973), attached hereto, which disposes of the raised "defense." In *Couch* the Highest Court held that a taxpayer could not prevent the enforcement of a summons for the production of her income tax records (i.e., they belonged to her personally) held by her accountant by raising the Fourth or Fifth Amendments. It noted as follows:

> It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: It adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States,* 228 U.S. 457, 458 (1913). (Emphasis by the Court.)

---

[1] The attorney-client privilege is not discussed:

> [I]f an unprivileged document exists before there exists an attorney-client relationship the mere delivery of the document to an attorney does not create a privilege * * *.

Bouschor v. United States, 316 F.2d 451, 457 (C.A. 8, 1963) a summons enforcement case which disallowed the appellant-attorney's claim of privilege. In Texas see the recent case of *United States v. White,* 326 F.Supp. 459 (SD Tex., 1971).

> In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production.

The Supreme Court in *Couch,* noting that "no confidential accountant-client privilege exists under Federal law, and no State-created privilege has been recognized in Federal cases", goes on to state "that no Fourth [2] or Fifth Amendment claim can prevail where, as in this case, there exists no *legitimate* expectation of privacy and no governmental compulsion against the person of the accused." (Emphasis added)

II

The Courts do not condone the type of behavior which occurred in the instant tax investigation

Here records were held by Candy, the accountant, until he was informed of the instant tax investigation, he then advised the taxpayer, Mason, to refuse to cooperate, one day later the accountant's records found their way to Kasmir, the taxpayer's attorney.

> It would be clearly erroneous to attribute to these sham transactions the affect of transferring possession since to do so would violate the rule that the power of the Commissioner to investigate the records and affairs of taxpayers must be liberally construed. (Citations omitted.)

Judge Ingraham in the summons enforcement case of *United States v. Baldridge,* 281 F. Supp. 470, 473 (SD Tex., 1968) where the Court further notes, at pp. 472-473, that it does not sanction the "frantic eleventh hour effort on the part of the taxpayer to put these records and work papers beyond the reach of the Government." Similarly see *United State v. Zakutansky,* 401 F. 2d 68 (C.A. 6, 1968);

[2] See United States v. Giordano, 419 F.2d 564, 568-569 (C.A. 8, 1969), a summons enforcement case which states that "the Government has the statutory right to this information", for an analysis of the Fourth Amendment "defense".

Bouschor v. United States, 316 F. 2d 451 (C.A. 8, 1963) and *Deck v. United States,* 339 F. 2d 739 (C.A. DC, 1964), cert. den. 379 U.S. 967 (1965). It is obvious that the respondents and taxpayer herein were playing the "shell game" in an attempt to thwart the instant investigation. For that reason alone, notwithstanding the clear holding in *Couch,* this Court should grant immediate relief to the United States.

Conclusion

It is respectfully submitted that this Court should grant immediate enforcement of the summonses at issue.

Frank D. McCown
United States Attorney

s/ Kenneth J. Mighell
Kenneth J. Mighell

Assistant United States Attorney

By: s/ Jeffrey D. Snow
Jeffrey D. Snow
Trial Attorney, Tax Division
Department of Justice
Washington, D.C. 20530
Of Counsel

HEARING ON PETITION TO ENFORCE
INTERNAL REVENUE SERVICE SUMMONS

(Number and title omitted) (Filed: April 23, 1973)

BE IT REMEMBERED that on the 28th day of March, A.D. 1973, at 9:15 A.M., the following proceedings were had in the above cause before Honorable ROBERT M. HILL, United States District Judge, at Dallas, Texas:

—

APPEARANCES:

Hon. KENNETH J. MIGHELL,
Assistant U. S. Attorney,
Dallas, Texas,

and

(1-A) Hon. JEFFREY SNOW, Tax Division
U. S. Department of Justice,
Washington, D.C.

For the PETITIONERS

Hon. EDWIN A. COPLEY

and

Hon. CYRIL D. KASMIR, Dallas, Texas,

For the RESPONDENTS.

• • • •

9:15 A.M.

(5)

THE COURT:

We have CA 3-6973-D, United States of America and James S. Mabry, Special Agent of the Internal Revenue Service, Petitioners, versus C. D. Kasmir and Jerry A. Candy, Respondents. Is the Government ready?

MR. MIGHELL:

You Honor, the Government is ready, and I would like to present Mr. Jeffrey Snow, an attorney from the Tax Division of the Department of Justice, who is going to appear on behalf of the government in this case.

THE COURT:

All right. What says the Respondents?

MR. COPLEY:

Your Honor, the Defendants or Respondents are ready. I represent the Defendants, Mr. Kasmir and Mr. Candy, together with Mr. Kasmir, who is also present.

THE COURT:

Is there going to be any testimony in connection with the case?

MR. MIGHELL:

Your Honor, the Government will put on witnesses, yes.

THE COURT:

All right. Bring them forward. Do the Respondents have any witnesses?

MR. COPLEY:

Your Honor, we will probably put on the stand Mr. Kasmir and Mr. Candy.

(6) THE COURT:

All right. Let's swear them at this time. All of the witnesses rise, please, and raise your right hands.

(Witnesses sworn.)

THE COURT:

Who will you have first?

MR. SNOW:

You Honor, the United States will call Agent Mabry.

THE COURT:

Come up, Mr. Mabry.

Before we get into the testimony, why don't you just briefly tell me what kind of relief you seek.

MR. SNOW:

Your Honor, this litigation resulted from failure to comply with two Internal Revenue summonses, and these summonses cover, roughly, Attorney Kasmir and Accountant Candy's failure, on January 5 of this year—a summons requiring records which had been in the possession and under the ownership of Tannebaum accounting firm here in Dallas, and the records on the 15th of January, which was the response date for the summonses were not turned over to the Internal Revenue, and Internal Revenue required these records to go forward, in effect to really start a tax investigation of the taxpayer, Dr. Edwin J. Mason.

So, Your Honor, we briefly state that we are here trying to get the Court order compelling production of the accont- to get the Court order compelling production of the accountant's records for the Government.

(7) THE COURT:

All right. What is your position of it?

MR. COPLEY:

Your Honor, our position is, fairly simply stated, that at the time the summonses were served on Mr. Kasmir and on Mr. Candy, Mr. Candy, the accountant, did not have possession of any records relating to the taxpayer.

In fact, Mr. Candy did not work for the accounting firm that prepared the returns for Dr. Mason in the years 1969 and 1970; he did start to work for the accounting firm in December of 1971; and

The only records which has has worked on have been those for the year 1971.

Now, in any event, at the time he was served with the summons, he had no records. They had been delivered back to Dr. Mason, at Dr. Mason's request, and at the request of Mr. Candy's employers, Mr. Tannebaum et al.

At the time of the service of the summons on Mr. Kasmir, Mr. Kasmir had been employed by Dr. Mason as his attorney, Your Honor, to protect these records, and Mr. Kasmir at the time did have possession of the records sought by the Government.

But we feel that, on the ground of attorney-client privilege, and on the ground that Mr. Kasmir had been retained expressly to protect these records, that on (8) behalf of the taxpayer he asserted the Fourth and Fifth Amendments.

THE COURT:

You say that Candy had no records whatsoever?

MR. COPLEY:

At the time he was summonsed, yes.

THE COURT:

All right.

MR. COPLEY:

Thank you.

THE COURT:

Thank you.

MR. SNOW:

May I respond shortly?

THE COURT:

Briefly. Yes.

MR. SNOW:

He had no records because the order was issued one day

prior to the date of the summons and the accounting firm had turned over the records which found their way to Kasmir.

The attorney-client privilege; we are asking for no testimony from Kasmir or asking for any confidential communications that he had with the taxpayer;

We are asking for records which were complete and finished before any attorney-client relationship.

Finally, Your Honor, this occurrence only occurred after all of the parties involved knew that the special agent was making a tax investigation, and the proof will connect this up.

THE COURT:

All right.

MR. SNOW:

For the record.

(9) THE COURT:

All right, go ahead.

JAMES S. MABRY, a witness called by the Petitioners, having first been duly cautioned and sworn, testified on his oath as follows, to wit:

DIRECT EXAMINATION

BY MR. SNOW:

Q. For the record, Agent Mabry, please state your name to the Court, please.

A. James S. Mabry.

Q. And your address?

A. 1127 North Clinton, Dallas, Texas.

Q. And for whom are you employed?

A. Internal Revenue Service.

Q. What division of the Internal Revenue Service?

A. Intelligence Division.

Q. I see. What is your job title?

A. I am a Special Agent.

Q. And special agents are basically concerned with investigating alleged criminal violations of the Internal Revenue Code?

A. My job is to ascertain if a violation has occurred (10) of the Internal Revenue Code.

Q. Now, sir, in the course of your official duties, do you carry a badge?

A. Yes, I do.

Q. Sir, how long have you been employed as a special agent by the Internal Revenue?

A. About a year and a half.

Q. As a special agent, are you authorized in your investigations to issue internal revenue summonses?

A. Yes.

Q. I see. Sir, directing your attention to January 3rd of 1973, in what district of the Internal Revenue Service were you assigned?

A. Dallas District.

Q. Now, sir, again, with reference to that date, January 3rd, what particular type of investigation, if any, were you working on?

A. Edward J. and Raye A. Mason.

Q. Now, sir, you mentioned the taxpayer, Edward J. Mason; can you indicate to the Court on what date you made initial contact with Mason?

A. On January 3rd.

Q. Of 1973?

A. Yes, sir.

Q. To your knowledge, had anybody from Internal (11) Revenue, with reference to this investigation, contacted Mason before that date?

A. No.

Q. Now, sir, you indicated that you made initial contact with Mason on January 3rd.

A. That's right.

Q. At about what time did you do this, and how did you do it?

A. Special Agent Herb Linder and I visited Mason's office at two o'clock on January 3rd of this year.

Q. Now, was Mason present when you visited that office?

A. Yes, he was.

Q. Will you indicate, was there anything you did to identify yourself?

A. I introduced myself as a special agent for the Internal Revenue Service, and both Herb Linder and I produced our credentials for him to examine.

Q. I see. Did you explain to Mason why you were making this call?

A. Yes.

Q. And what did you tell him?

A. I told him that his tax returns for the years '69, '70

and '71 were under investigation, and that I wanted to visit with him about the tax returns.

(12) Q. Now, prior to any further discussion, did you have occasion to give Mason any constitutional warnings?

A. Yes, I did. I advised him of his constitutional rights, as prescribed by our Manual, 93.84.

Q. Now, after giving him his rights, what, if anything, happened?

A. We talked for approximately two hours about his personal background and about his financial dealings and how his records are kept.

Q. Now, during the course of your two-hour conversation, did you have occasion to make any requests of Mason?

A. Yes. I requested that I be allowed to examine his personal books and records.

Q. And what was his response to this request?

A. He produced his books and records and put them on his desk and gave his permission for me to examine them.

Q. And did you look through his records to any extent?

A. Only casually, to see if they were complete, and any question as to their completeness. I thought at the time there were some missing. He said that if there were any missing, they would be at the accountant's office.

Q. I see, and what, if anything, did you ask him at that point?

A. I didn't ask him, but he went to the telephone and made a call.

(13) Q. I see. Were you in the room when he made this call?

A. Yes.

Q. Now, will you describe what you heard in this call?

A. I heard him respond, or heard him say that he had been advised of his rights, and that I was a special agent.

Q. I see.

A. And then later he told me that he had been advised not to produce any records and not to answer any more questions.

Q. I see. This was after the conclusion of the phone call?

A. Yes, sir.

Q. And did he furnish any more records?

A. The records were still up on the forward portion of his desk, but he denied me permission to take them.

Q. You indicated that at about what time this call from Mason was made on that date, January 3rd?

A. I can't recall exactly, but it was near 4:00 o'clock.

Q. I see, and did he indicate to you on that date to whom that call was directed?

A. Yes. He told me that he had called his accountant.

Q. I see. What firm is that?

A. He said it was—he said later it was Tannebaum, (14) and Mr. Candy with Tannebaum, Bindler and Lewis.

Q. Now, sir, after that initial call, which you indicated was somewhere around four o'clock, did you have occasion to continue your conversation with the taxpayer?

A. Yes. He was groping with the decision as to whether to furnish the records to me or not—

MR. COPLEY:

Your Honor, we object to the response as conclusionary.

THE COURT:

I sustain it.

A. He told me that he was undecided as to whether to furnish them or not.

Q. I see.

A. And then he—

Q. Well, let me—

A. Oh. Go ahead.

Q. Now, as you went along, were there any further phone calls made by Mr. Mason?

A. Yes, he made—no, there was no other call he made.

Q. Were there any calls he received, received by Mason?

A. Yes, he received a call.

Q. Okay; describe that.

A. He later told me that it was his attorney, who had also advised him not to produce any records nor to (15) answer any more questions.

Q. Now, between the first call which he made and the second one which he received, were you in his presence?

A. Yes.

Q. Did he make any calls between that time?

A. No.

Q. Did he identify to you on that date the name of his attorney?

A. Yes, he did.

Q. What was that man's name?

A. Mr. C. D. Kasmir.

Q. Did Mason subsequently on that date withdraw the records he had placed before you?

A. Yes, sir, he did.

Q. And I presume that concluded your visit on the 3rd?

A. Yes. We left.

Q. And about what time was your visit concluded?

A. Four o'clock.

Q. Well, let's move ahead, sir, one day ahead on January 4th, and I will ask you what steps, if any, you took on that date to secure these records for the investigation.

A. I telephoned Mr. Candy and arranged a convenient time that he and I could meet.

Q. You were now looking for the accountant's records, is that right?

(16) A. Yes.

Q. What, if anything, did Candy indicate to you?

A. He told me that he did not have possession of the records, that Mr. Kasmir had possession, and that he would be happy to meet with me in Mr. Kasmir's office.

Q. Did you have any further contact with Candy or Kasmir on that date?

A. No, I didn't.

(Mr. Snow hands instrument to opposing counsel.)

MR. SNOW:

Your Honor, I would like to at this time submit into evidence by agreement with counsel five exhibits:

(Government's) Exhibit Number 1 is the summons directed to Mr. Candy.

(Government's) Exhibit Number 2 is the summons directed to Mr. Kasmir;

(Government's) Exhibit 3 will be a statement dated January 15th from Candy;

(Government's) Exhibit Number 4, Your Honor, will be a statement dated January 15th from Kasmir;

(Government's) Exhibit Number 5 is a power of attorney apparently signed by Kasmir, Tannebaum and Candy.

MR. COPLEY:

Is it not signed by Dr. Mason?

(17) MR. SNOW:

(Counsel looks.) And it appears also on the front, Your Honor, to be signed by Mason and his wife.

Now, may these five exhibits be admitted into evidence, Your Honor?

THE COURT:

Any objection?

MR. COPLEY:

No objection.

THE COURT:

They are admitted.

(Mr. Snow places exhibits before witness.)

BY MR. SNOW:

Q. Agent Mabry, directing you attention to January 5, did you have occasion on that date to issue two summonses?

A. Yes, sir.

Q. To whom was the first summons delivered on that date?

A. To Mr. C. D. Kasmir.

Q. The attorney?

A. Yes.

Q. And at the time you delivered that summons to Kasmir, what, if anything, did you say to him, and what did he say to you?

A. I introduced myself and asked him if he was in possession of records which belonged to Tannebaum, Bindler and Lewis, and he replied, yes, that he was, and I handed (18) him the summons.

Q. And subsequent to that or shortly after you handed him the summons, you handed a summons to Mr. Candy in his office?

A. Yes, sir.

Q. Now, sir, with regard to the records requested by the summons; they appear to be identical, is that right?

A. Yes.

Q. All right. I see. Now, what was the return date on those summonses?

A. January 15.

Q. And on that date Candy and Kasmir appear, as directed by the summonses?

A. Yes, they appeared.

Q. Did they bring any records, as directed by the summonses, with them?

A. Mr. Kasmir told me that they did not.

Q. All right. I see. Now, on that date, the 15th, and directing your attention to Exhibits 3, 4 and 5, did they hand you any documents?

A. (Witness looks.) Yes. Each handed me a prepared statement, and these are the statements, (Government's) Exhibits 3 and 4, and Mr. Kasmir also handed me a power of attorney.

Q. All right.

(19) A. (Government's) Exhibit Number 5.

Q. Did Mr. Kasmir indicate anything else to you on the 15th?

A. He stated in the preliminary form that the reason that he was referring to answer the questions.

A. These are explained, apparently, in (Government's) Exhibits 3 and 4?

A. Yes.

Q. All right.

A. He also said that he wanted a hearing in District Court on these issues.

Q. All right. Sir, have you obtained any of these records through any other sources since January 15th?

A. No.

Q. And what is the state of your investigation without these records?

A. Well, the records are crucial to the investigation, that we have been denied access to Dr. Mason's personal records. In order to ascertain the correct tax liability and if a violation of the Internal Revenue Code has taken place, we need them, and to fill in the links in the preparation of the tax return from the taxpayer to the time it was submitted, I need those records that were prepared by the accountant.

Q. I see. In other words, the mere fact that (20) Internal

Revenue has the tax returns for the years in question does not necessarily reflect the correctness?

A. No, it does not.

Q. And you want to go back and find out how the return was—

A. (Interposing) Yes, I want to trace from the tax returns to the source of the information that went into the tax returns; I have to see that as to completeness and accuracy.

Q. Now, sir, I note in the summons you were asking for the retained copies held by the accountants of the three tax returns, and you have indicated to me, I believe, that we already have copies of the tax returns.

Now, why are those retained copies necessary, why are they required?

A. To see if the tax return filed is the same as the one the accountant prepared.

Q. Now, sir, should you obtain that information under the direction of the Court, might there be any possible criminal or civil tax consequences?

A. There could be civil consequences, either additional taxes due or a refund to Mason.

Q. All right.

A. And there could be a criminal prosecution.

Q. Particularly on the criminal prosecution, have you (21) gotten to the point of recommending any such prosecution?

A. No.

Q. Could you, at this point, without these records?

A. No. The investigation has just begun.

Q. Now, sir, is there any other agent of Internal Revenue assigned with you on this particular investigation?

A. Yes. There is a Revenue Agent, Dennis Healey.

Q. And what division does he work in?

A. Field Audit Division.

Q. And should you get these records, what will his task be?

A. He would be assigned to ascertain the civil liability.

Q. He will work under your direction in that regard?

A. Yes.

MR. SNOW:

I have no further questions.

THE COURT:

Cross examination.

MR. COPLEY:

Thank you, Your Honor.

CROSS EXAMINATION

BY MR. COPLEY:

Q. Mr. Mabry, you specified that you gave a warning required by the Manual, 93-84; what is required by that Manual?

A. It requires that the prospective—the principal (22) under investigation be warned of his rights.

Q. And what does it say, what warning do you give, specifically?

A. I don't try to remember it. I have it written down and I read it to Dr. Mason.

Q. You read part of the Manual?

A. A transcript.

Q. To Dr. Mason?

A. A transcript of my handbook.

Q. You do not have a copy of that with you?

A. Yes, I have it with me.

Q. Would you read it to the Court?

A. (Witness looks.)

"As a special agent, one of my functions is to investigate the possibility of criminal violation of the Internal Revenue law. In connection with my investigation of your tax liability, I would like to ask you some questions. However, first I advise you that under the Fifth Amendment of the Constitution of the United States, I cannot compel you to answer any question or to submit any information, if such answers or information might tend to incriminate you in any way. I also advise you that anything which you say and any information which you submit may be used against you in any criminal proceedings which may be undertaken. I advise you further that you may, if you wish, seek the assistance (23) of an attorney before responding. Do you understand your rights?" And he responded that he did.

Q. Now, the records that he placed on his desk, what was the nature of those records?

A. I didn't actually examine the records. He told me that they were check stubs and—

Q. But you did not examine them at that time, the records?

A. That's right.

Q. Did you take possession—

A. That at the time—

Q. Did you take—

A. That is the affirmative.

Q. I am sorry.

A. That is the affirmative; I did not examine the records.

Q. Did you take possession of any of the records and take them with you before you left Dr. Mason's office?

A. No.

Q. Did you make any copies of any of those records?

A. No, I didn't.

Q. Did you make notes from any of those records?

A. No, I didn't.

Q. Did Mr. Mason—when you asked him the question, who was his accountant, what was his reply?

(24) A. He said that Mr. Candy, or said the firm name, Tannebaum, Bindler & Lewis.

Q. But he said Mr. Candy was his accountant?

A. Yes, he did.

Q. Did you, in this case, issue a summons to any other person other than Mr. Kasmir and Mr. Candy?

A. I named in my summons to Mr. Candy Tannebaum, Bindler & Lewis.

Q. What do you mean?

A. But no other summons was issued than the two here that are exhibits.

Q. Well, what do you mean, you named them in the summons, Tannebaum, Bindler and Lewis?

A. Well, in the "TO" section of the summons, it says "Jerry A. Candy, Tannebaum, Bindler & Lewis."

Q. Did you discuss this matter with anyone in that office other than Mr. Candy?

A. Mr. Tannebaum greeted me and asked if he could help.

Q. Did he know why you were there?

A. I didn't tell him why I was there.

Q. Did you discuss the case with him?

A. No.

Q. So, the only person, the only accountant that you discussed the case with is Mr. Candy?

(25) A. Yes.

Q. What did you tell Mr. Candy when you came to him on January 5th?

A. I told him that as part of my investigation of Dr. Mason's tax liability I wanted to look at his work papers.

Q. What did he say to you at that time?

A. He said he didn't have the work papers, and they were in the possession of Mr. Kasmir.

Q. Did he tell you when they were turned over to—he said they were in the possession of who?

A. Mr. Kasmir.

Q. Mr. Kasmir?

A. Yes.

Q. Did he say to whom he turned the records over?

A. Yes, he did.

Q. Who?

A. He said he had taken them to Dr. Mason's office and he received a receipt and he produced the receipt and I looked at it.

Q. Did you ask Mr. Candy if he prepared the 1969 return?

A. Yes, I did.

Q. What was his reply?

A. He said he didn't and he didn't know who did.

(26) Q. Did he indicate that he had prepared the 1970 return?

A. No.

Q. The income tax return for 1970?

A. His answer was the same for 1970.

Q. He said he did not?

A. Yes.

Q. What about 1971?

A. He said he did prepare the 1971 return.

Q. Did he say that he was an employee of Tannebaum, Bindler & Lewis?

A. I didn't ask him if he was.

Q. You didn't ask him if he was an employee?

A. No.

Q. Did you ask him who his employer was?

A. No.

Q. Did you discuss with—your recollection—Mr. Candy whether or not you would summons Mr. Tannebaum?

A. I don't understand.

Q. Did you tell Mr. Candy or imply to Mr. Candy that you would or might summons Mr. Tannebaum?

A. I didn't discuss anything like that with Mr. Candy.

Q. In your testimony when you said Dr. Mason later told you who his accountant was, what do you mean by "later".

(27) A. During the same interview, and for further contact he told me in detail who his accountant was.

Q. What do you mean, in detail?

A. Well, he told me the name; he told me the phone number; he told me where they were.

Q. And when you said "he later told you who his attorney was," what did you mean by "later"?

A. That was immediately following what he told me about the accountant, the same interview.

Q. The same interview?

A. Same interview.

Q. The only time that you talked to Dr. Mason was at that one visit on January 3, 1973?

A. That is true.

Q. Have you ever talked to Mrs. Mason?

A. No.

Q. Have you ever tried to get Mrs. Mason?

A. No. I have never tried to talk to her.

(Conference between counsel for Respondents.)

BY MR. COPLEY:

Q. Who directed you to visit Dr. Mason?

A. No one directed me to visit Dr. Mason.

Q. How did you come to visit him?

A. I made the decision to visit Dr. Mason. (28)

Q. How did you select Dr. Mason for the purpose of this visit?

A. The three tax returns and the investigation was assigned to me, and as part of that I visited the principal in the investigation.

Q. In other words, you are saying that, in the course of the work of the Intelligence Division, the three tax returns were assigned to you?

A. Yes; three tax returns and the investigation was assigned to me.

Q. Who assigned those to you?

A. My supervisor.

Q. Who is he?

A. Joseph T. Houston.

Q. Have you talked to anyone other than Dr. Mason, Mr. Kasmir, Mr. Candy, about this case?

A. Yes. I talked to Joseph Houston.

Q. Who is he?

A. He is my supervisor.

Q. Anyone else?

A. Special Agent Marcus Henry.

Q. Anyone else other than your counsel?

MR. SNOW:

Your Honor, we are going to object to this; this is immaterial.

THE COURT:

What is the relevancy?

(29) MR. COPLEY:

Well, Your Honor, he has alleged that it is crucial to have these records, and we are trying to understand why it is crucial and why the investigation is being conducted.

THE COURT:

Well, he says it is an investigation of a taxpayer. I will sustain the objection.

(Conference between counsel for Respondents.)

BY MR. COPLEY:

Q. Mr. Mabry, you stated that in meeting with Mr. Candy on the 5th he displayed to you a receipt from Dr. Mason?

A. That's right; that is what he said.

Q. Did he show you the receipt?

A. Yes, he did.

Q. Would you remember the receipt if you saw it?

A. I could not. No.

MR. COPLEY:

No further questions.

THE COURT:

Wait a minute. Just a minute.

(Conference between counsel for Respondents.)

MR. COPLEY:
That is all.
THE COURT:
Are you through?
MR. COPLEY:
Yes.
THE COURT:
Go ahead.
MR. SNOW:
No further questions.
(30) THE COURT:
Step down, Mr. Mabry.

(Witness excused.)

THE COURT:
Who will you have next?
MR. SNOW:
Your Honor, as an adverse party, we will call Mr. Candy.
THE COURT:
Come up.

JERRY A. CANDY,

one of the Respondents, called under the Adverse Witness Rule, having been first duly cautioned and sworn, testified on his oath as follows, to wit:

DIRECT EXAMINATION

BY MR. SNOW:
Q. For the record, Mr. Candy, please state your full name and resident address.
A. Jerry A. Candy. I live at 13219 Flagstone Lane, Dallas.
Q. Mr. Candy, what business are you in?
A. I am employed as an accountant by Tannebaum, Bindler & Lewis.
Q. And where did you receive your accounting degree?
(31) A. Southern Methodist University.
Q. And what year was that, sir, approximately?
A. 1967.
Q. And since then you have practiced as a CPA?
A. No. I received my certificate as a CPA subsequent to that time.
Q. You have practiced as an accountant since 1967?
A. Yes, and before.

Q. Now, it is true that during the course of your employment with Tannebaum, Bindler and Lewis—you are employed by them, is that right?
A. That is correct.
Q. When were you employed by them?
A. In December of 1971.
Q. And after that time you had caused, did you not, to have the Edward and Raye Mason account?
A. That account was directed to me sometime around February or March of 1972 for the purpose of preparation of the 1971 income tax return.
Q. You say the purpose was to—the purpose of that account was to prepare their federal income tax return, is that so?
A. The purpose of the direction at that time was, yes.
Q. And I assume that you, yourself, in doing this, (32) prepared certain work papers; isn't that so?
A. In the preparation of the tax return, yes.
Q. Now, pertaining to this account with the Tannebaum accounting firm, how long had the account been with the firm?
A. I cannot answer that question.
Q. Well, you have been told, haven't you?
A. No.
Q. Huh?
A. I am sure it has been for a number of years, but I don't know how many.
Q. Well, I received an answer yesterday afternoon from you and received a certificate from you and it says here, and you signed it, that for a number of years, for the years 1969, 1970, and 1971, the taxpayer had employed the firm of Tannebaum, Bindler & Lewis—now, do you stay with that?

THE COURT:
He says several years.
A. I said for several years.
THE COURT:
He did not deny that.

BY MR. SNOW:
Q. Now, sir, there has been some testimony as to a receipt, I think, here, and I have a copy which I disassociated from the answer—(counsel looks)—is that the receipt you are talking about (handing to witness)?

(33) A. (Witness looks.) That is correct.

MR. SNOW:
I will mark this. I would offer that, Your Honor, as Government's Exhibit Number 6.
THE COURT:
Any objection?
MR. COPLEY:
No objection.
THE COURT:
It is admitted.

(REPORTER'S NOTE: Photocopy of letter dated January 3, 1973, to Tannebaum, Bindler & Lewis, from Dr. E. J. Mason, was marked as:

GOVERNMENT'S EXHIBIT NO. 6.)

BY MR. SNOW:
Q. When did you receive that receipt?
A. I initially received it late in the afternoon on January 3rd, unsigned.
Q. Unsigned?
A. It was typed in our office.
Q. I see.
A. Yes, sir.
Q Pursuant to whose instruction was it typed?
A. It was typed by instruction of my employer.
Q. I see, and that was late in the afternoon?
A. That is correct.
(34) Q. Of the 3rd?
A. That is correct.
Q. Now, sir, on the 3rd had you received a phone call from Mason?
A. Yes, I had.
Q. And that was around four o'clock in the afternoon?
A. Well, as I recall, it was around 2:30, because I glanced at the clock.
Q. 2:30?
A. Yes.
Q. And after that call you called Kasmir, is that correct?
A. That is correct.
Q. I see, and after the initial call from Mason to you, you prepared that particular exhibit 6, is that so?
A. Well, I talked to my employer first.

Q. Then it was prepared, is that so?
A. Then it was prepared.
Q. And it is true, is it not, that you asked Mason, during the initial phone call which you indicated was about 2:30, "Is the man you are talking to a special agent?"
A. That is correct.
Q. And you advised Mason, did you not, that it was your opinion that he should refuse to show any of his, Mason's, records to the special agent?
(35) A. That is correct.
Q. Now, according to your answer, it was one day later on January 4th that the records—and I am talking about the records of Tannebaum—where delivered over, is that so?
A. That is true.
Q. And you delivered them, is that so?
A. I delivered them to Dr. Mason.
Q. Was that after the call from the special agent to you?
A. No; that was at approximately eight o'clock in the morning.
Q. I see, and you received the call a little later?
A. Sometime in the afternoon.
Q. When you delivered them to Mason, where did you deliver them, right to Mr. Kasmir's office?
A. No. I delivered them to Dr. Mason's office at the hospital on Forest Avenue.
Q. I see, and you were not with Mason when he presented them to his attorney?
A. No, I was.
Q. And I presume that we are talking about Exhibit 6, and it was executed on that date, the 4th, at the time you made the delivery?
A. That is correct.
(36) Q. Now, sir, you have been with the Tannebaum firm, I think you said—correct me if I am wrong, since 1969?
A. Since December, 1971.
Q. Excuse me, and you were with an accounting firm before that, I suppose?
A. That is true.
Q. I see. Now, have you ever had any agreement, prior to the 3rd, with Mason as to the ownership of control of your accountant's records?
A. I would have none, being an employee of the firm,

but if any were present, they would be done by the firm, and I have no knowledge of that.

MR. SNOW:

Now, Your Honor, I ask that that answer be stricken as not responsive.

BY MR. SNOW:

Q. I ask you if you had any, to your knowledge.

A. No, I did not.

Q. Now, the second question, do you know whether anyone in that law firm did?

A. No, I don't.

Q. Now, is it your practice, as an accountant, to turn over records to the taxpayer at this request, as happened here?

A. No.

Q. No. Is it your practice, as an accountant, to (37) turn over records to a taxpayer after you are advised that the taxpayer is under tax investigation by intelligence, as happened here?

A. At the direction of my employer.

Q. That is Tannebaum, is that so?

A. Tannebaum, Bindler & Lewis.

Q. Now, sir, I would direct you to what has been marked as (Government's) Exhibit 5 and I am sorry you don't have it—(handing instrument to witness).

This is the power of attorney, is it not?

A. (Witness looks.) That is true.

Q. Did you prepare that power of attorney and present it to the special agent on January 5 when he served you with the summons?

A. No, I did not.

Q. There was no such power of attorney in existence at that time, was there?

A. Yes, there was.

Q. Did you have a copy of it?

A. I did.

Q. Did you execute that, did you sign it?

A. Yes, I did.

Q. When did you sign it?

A. January 3rd.

Q. You signed it January 3rd?

(38) Q. In other words, after the phone call we have been talking about, the phone calls, you apparently visited with Kasmir later in the afternoon?

A. That is true.

Q. Where was that particular form prepared, in Kasmir's office?

A. It was prepared in our office.

Q. Well, I notice on the back it was not notarized. Any particular reason for the failure of the notary?

A. Being signed by an attorney licensed to practice in the State of Texas and a certified public accountant, I don't believe it is necessary to notarize it.

Q. Well, sir, let me ask you this, out of curiosity.

You say that you went over to see Kasmir—I presume his office was fairly close?

A. Yes.

Q. You walked over there?

A. Yes.

Q. But you didn't turn the records over until the following day. Now, what was the reason for that?

A. Well, first of all, I was not supposed to turn the records over to Kasmir; I was directed by my employer and the taxpayer to turn the records over to him.

Q. Oh, I see; you were not supposed to turn them over directly to Kasmir; they had to go to the taxpayer (39) first; is that correct?

A. I delivered them to the taxpayer.

Q. Uh huh.

Q. What the taxpayer did with them, I do not know.

Q. You don't know; you were just following instructions?

A. That is correct.

THE COURT:

Did you say you were there when the taxpayer handed them to Kasmir?

A. Yes, sir.

THE COURT:

So you do know where they went?

A. Yes, I do know.

Q. You gave them to the taxpayer and then you say you were there when the taxpayer gave them to Kasmir?

A. Yes, sir.

Q. And that took place all at one time?

A. Within a short period of time.

Q. Within five minutes?

A. Five to ten minutes.

Q. Now, sir, please direct your attention to (Government's) Exhibits 3 and 4 (handing to witness), specifically Exhibit 3; you signed that exhibit 3, did you?

A. (Witness looks.) Yes, I did.

Q. And that was on the 15th?

A. Yes, it was.

(40) Q. I see. Who prepared that statement?

A. The attorney.

Q. I see. Did he have a discussion with you as to what was to appear in this statement before it was prepared?

A. Yes.

Q. Do you agree with that statement?

A. Yes, sir, I do.

Q. Well, because we don't know, you can merely answer "yes" or "no"—

Pursuant to the summons directed to you—that is the exhibit 1 or 2 there—your firm did, and you had orders, did you not, to retain copies of the tax return for the three years under investigation?

A. Yes, sir.

Q. And you did deliver, did you not, the accountant's work papers?

A. I delivered the work papers, yes.

Q. And you did deliver, did you not, other correspondence and miscellaneous data described in the summons?

A. Yes.

Q. And, of course, Mason gave you a receipt, is that correct?

A. That is correct. He signed the receipt that I have.

Q. Now, why did you require a receipt?

(41) A. As a standard practice in our office, whenever we deliver any records either belonging to us or belonging to the taxpayer, we require a receipt, acknowledgement that those records have been turned over.

So that you have got this receipt, and when you get the records back you will know what you gave up and what you are supposed to get back?

A. That's right.

MR. SNOW:

All right. Any further questions would belabor the point. I have no further questions now.

CROSS EXAMINATION

BY MR. COPLEY:

Q. Mr. Candy, except at the direction of Mr. Tannebaum, your employer, did you ever have possession of the tax returns and related data for the years 1969 and 1970?

A. No.

Q. What was the purpose of your having possession of those records for 1969 and 1970?

A. I wouldn't have had them for any reason, other than for comparison to see what items would need to be picked up in the 1971 income tax return.

Q. And did you make such a comparison?

A. Only with 1970.

(42) Q. Did you take the 1969 and 1970 returns and the 1971 returns and all of the related documents with respect to those three years, at the direction of Dr. Mason, and at the direction of your employer, and give them physically to Dr. Mason?

A. Yes, sir.

Q. Did you give them to Mr. Kasmir at any time?

A. No, sir.

Q. Now, I want to make sure I understand the situation on this receipt.

This receipt was prepared on January 3rd?

A. Yes, sir.

Q. And in the morning of January 4 you delivered the records to Dr. Mason?

A. Yes.

Q. And he signed that receipt?

A. Yes, sir.

Q. Did he sign that receipt at that time?

A. Yes, sir.

Q. I guess I had better ask you, and no one has asked; what is the nature of Dr. Mason's business?

A. He is a doctor, physician.

Q. A practicing physician?

A. Yes, sir.

Q. Where is his office?

(43) A. 2516 Forest Avenue.

Q. At any time subsequent to the time of the delivery of the documents to Dr. Mason, have you had possession of those documents?

A. Yes, sir.

Q. You have?
A. You mean after?
Q. After.
A. Oh, no; not after.
Q. Let me make this clear.
From the time that you delivered the documents to Dr. Mason on January 4, have you ever had possession of them?
A. No, sir.
Q. Since that time?
A. No, sir.
Q. Now, let me direct your attention to the meeting you had with special agent Mabry on January 5.
Did Special Agent Mabry ask you who prepared the 1969 or 1970 returns?
A. Yes, sir, he did.
Q. And what was your reply?
A. I told him I did not know; I would have to ask my employer.
Q. Did you tell him who your employer was?
A. Yes, sir, I did. I told him Sam Tannebaum.
(44) Q. What did he say to that?
A. He said, in leaving, that he guessed he would have to summons him, also.
Q. Summons Mr. Tannebaum also?
A. Yes, sir.

MR. COPLEY:
That is all we have, Your Honor.
THE COURT:
All right.
MR. SNOW:
Your Honor——
THE COURT:
Any redirect examination?
MR. SNOW:
Short redirect examination, Your Honor, or recross.
THE COURT:
Go ahead.

REDIRECT EXAMINATION

BY MR. SNOW:
Q. Mr. Candy, I have just one question and I would appreciate an honest answer.

You had access to all of these records under the summons any time you required them, did you not?
A. I don't think I understand.
Q. You had access to all of the records which were summonsed at any time you required them, did you not?
A. Prior to the summons?
Q. Sure.
A. Yes.
(45) Q. Sure.
A. I had access.
Q. Because there might be a loss carry-over that you might have to go back and look at the previous papers and so on, isn't that right?
A. After or before?
Q. Before; before.
A. Before, yes.

MR. SNOW:
Of course. Thank you. No further questions.
MR. COPLEY:
Your Honor, just one question on direct examination.
THE COURT:
Go ahead.

RECROSS EXAMINATION

BY MR. COPLEY:
Q. In what capacity did you have access to those records?
A. As an employee.
Q. If Mr. Tannebaum directed you not to have access, would you have honored those instructions?
A. I would have had to.

MR. COPLEY:
No other questions.
MR. SNOW:
One further question.
(46)

RE-REDIRECT EXAMINATION

BY MR. SNOW:
Q. But the instructions were, whenever it occurred, that only occurred after you received the call from Mason on the 3rd, isn't that so?
A. The direction not to have access?
Q. Yes.

THE COURT:
You never got such access?
A. I never got direction not to have access.
MR. SNOW:
Oh. I see. I am sorry. Excuse me. No further questions.
MR. COPLEY:
Nothing further.
THE COURT:
Step down.

(Witness excused.)

THE COURT:
Who will you have next?
MR. SNOW:
We would like to have attorney Kasmir.

C. D. KASMIR,

one of the Respondents, called by the Petitioner, having been first duly cautioned and sworn, testified on his oath as follows, to wit:
(47)

DIRECT EXAMINATION

BY MR. SNOW:
Q. Now, let's just go day by day—excuse me, Mr. Kasmir. Please state your full name and your address, please, sir.
A. Cyril David Kasmir; 5227 North Moore, Dallas.
Q. Now, Mr. Kasmir, let's go back to January 3rd.
Now, on that date in the afternoon, probably around three o'clock, and correct me if I am wrong, you received a call from accountant Candy, is that not true?
A. That is correct.
Q. And what did he say to you and what did you say to him?
A. He advised me that the special agents of the Internal Revenue Service were at Dr. Mason's office, and that he had instructed Dr. Mason, and Dr. Mason wanted them to talk to him.
Q. And he further advised you, did he not, that he had indicated to Mason that Mason should not show the agents his records in his office?
A. As I recall, I asked Mr. Candy, I asked Mr. Candy what advice he had given to Dr. Mason.
Q. And was that his response to you, generally?

A. As I recall, he told him not to answer any further (48) questions or to produce any documents.
Q. Then did you issue any instructions to Mr. Candy at that time?
A. No. I instantly called Dr. Mason.
Q. All right. I see, and you told Mason that, in your opinion as counsel, he should not show any more records and not testify, is that correct?
A. I asked Dr. Mason who was visiting him, who was calling upon him, and he told me it was special agents from the Internal Revenue Service, that they had given him what I termed the Miranda warning, and I advised him to respectfully decline to say anything and respectfully decline to give them any records, and to give them my name and phone number and I would be happy to talk to them subsequently.
Q. Now, after you had that call to Mason, what, if anything else, did you do on that afternoon, January 3rd?
A. Relative to what?
Q. Well, relative to this instant investigation; did you again contact the accountant or not?
A. As I recall—I just don't recall, to tell the truth.
Q. Okay. Well, I don't know; you know. On January 4th were certain records put in your possession?
A. On January 4th at approximately 7:30 in the morning I was at Dr. Mason's office on Forest Avenue, and in (49) my presence Mr. Candy handed over to Dr. Mason a large amount of files and records, and Dr. Mason signed the receipt for them that I believe you have marked as an exhibit.
Q. You then picked up the records and put them in your car?
A. No, I did not. Dr. Mason took possession of those records, signed the receipt, turned around and handed them to me and I went and placed them in my car.
And Dr. Mason and I went into his office and he gave me other records and he had in his office and he helped me put them in my car. This was about 7:30 o'clock in the morning.
Q. So that was your next contact with either Candy or Mason after the telephone call the previous day to Mason?
A. Well, we had had some discussion about when Mr. Candy was going to return the records.
Mr. Candy originally, I believe, was going to go out there

that evening; that is probably the reason the receipt stated the 3rd; and I believe Dr. Mason had an emergency or something and we just decided to make it the next morning.

Q. Now, sir, when was your legal relationship initiated with Mason, on the 1st, on the 3rd—?

THE WITNESS, KASMIR:

Your Honor, I respectfully (50) decline to answer this question, based upon the attorney-client privilege.

MR. SNOW:

We would ask that he be directed to answer, Your Honor; the attorney-client relation pertains to confidential communications. I am asking him for no communication; I am asking him for records that were already complete before he ever got them or got into the case.

THE COURT:

Restate your question.

BY MR. SNOW:

Q. When were you retained by Mason, what date, what time?

WITNESS, KASMIR:

Your Honor, for the same reason, I respectfully refuse to answer.

THE COURT:

I will overrule the objection. He is asking you when you were retained; he is not asking you any confidential statements.

A. I would say I was retained on January 3rd.

Q. In the late evening.

A. I would say approximately 2:30 or 3:00, whenever the phone call was made.

Q. When you made the phone call to Mason?

A. Yes.

Q. Then I assume that, since Candy called you, that you and Candy had worked on other matters prior to this?

A. Yes, we had.

(51) Q. You had not represented Mason prior to this?

A. No, sir, I had not.

Q. Now, am I to further understand, judging by your answer, that you and Candy came to some type of an employment arrangement on the 3rd or 4th?

A. Yes; we have a copy of that agreement, that contract, attached to our response

MR. SNOW:

If it please the Court, I would ask that this be admitted into evidence as an exhibit.

MR. COPLEY:

No objection.

(REPORTER'S NOTE: At this point, photocopy of instrument entitled Employment Agreement, consisting of three pages, signed by Cyril David Kasmir and Jerry A. Candy was marked as:

GOVERNMENT'S EXHIBIT NO.7.)

BY MR. SNOW:

Q. Then, sir, (Government's) Exhibit 7, is that the agreement, a copy of that agreement (handing to witness)?

A. (Witness looks.) Yes, it is.

Q. I see, and you gave the agreement to Candy, I presume, at Mason's office on the 4th, is that correct?

(52) A. No, it is not so.

Q. Well, what is so?

A. As I recall, I had my secretary type it up that afternoon and Mr. Candy came over and signed it.

Q. And did you prepare this power of attorney?

A. No. It was given to me by Mr. Candy.

Q. And then it is your testimony that after signing this—strike that.

Now, we go to January 5th; did you receive a summons on that date, is that so?

A. I was served by Special Agent Mabry with a summons, yes, that's correct.

Q. And that is at the time that you indicated to him that the records belonged to the accountant firm, is that so?

A. As I recall, I was rushing to go to a court hearing at the particular time, and Mr. Mabry caught me as I was leaving. He asked me if I had the records—I don't remember exactly the conversation, but I did respond, yes, I did.

MR. SNOW:

No further questions. The Government rests it case.

THE COURT:

Well, you may not; you may have some redirect.

MR. SNOW:

Excuse me, Your Honor.

THE COURT:

You had better wait until the cross (53) examination is over.

CROSS EXAMINATION

BY MR. COPLEY:

Q. Mr. Kasmir, how long have you been practicing law?

A. I was licensed by the Supreme Court of the State of Texas, I believe in 1969.

Q. Where did you go to law school?

A. I went to the University of Texas and received a Juris Doctorate Degree; I went to SMU Law School the year thereafter and received a Master in Taxation.

Q. Do you practice law with a firm?

A. Yes, sir; I am a member of the firm of Fischman, Rosenberg, Kasmir & Preston.

Q. Did Mr. Mason issue any instructions to you—

MR. COPLEY:

Your Honor, here I want to get into only the question of the files and communications.

Q. (Continuing)—did he issue instructions to you as to the delivery of the files?

MR. SNOW:

We will object, Your Honor; any answer that he can give is based on hearsay; if Mason delivered any such instructions, Mason is the same to so testify.

THE COURT:

I am going to overrule the objection.

A. Yes, he did. They were primarily—there was (54) one really controlling reason; Dr. Mason was concerned about how secure the files would be there in his office. His office is on Forest Lane (sic) and predominantly or totally a black neighborhood.

Q. Forest Lane?

A. Forest Avenue; excuse me.

So, he has had a serious problem with theft of property and money, and he was very concerned about how safe the records would be there, and I assured him that I had a secure place to keep them, and he also wanted me to take them and protect them.

Q. Protect them?

A. Yes.

Q. Protect them from what?

A. Well, he wanted me to protect them from any unauthorized or illegal search and seizure; he wanted me to assert any rights that he might have to protect them.

Q. When you said that you worked on other matters with Mr. Candy, would you explain that?

A. Mr. Candy is our firm's accountant, or the firm that Mr. Candy is employed by, or he is an employee of Tannebaum, Bindler & Lewis, who we deal directly with; I've handled various matters for clients of his; he has handled various matters for clients of mine; we have been friends for probably fifteen years, and we were classmates together, (55) also. That is when I was in SMU on my master's in tax, and Mr. Candy and I were in a couple of classes together.

Q. Had you worked on any tax fraud matters with Mr. Candy?

A. No, I haven't.

Q. Have you worked on any tax fraud matters at all for clients?

A. No. This is the first one.

Q. Well, I guess that brings up the question of, how did you know or what caused you to take all of this action that you took on those days, January 3, 4 and 5?

A. One of the courses I had at SMU was tax procedures, tax procedures and litigation, taught by Mr. Kopp Williams and Mr. Herb Kendricks, and my recollection is that we spent nine class hours analyzing tax fraud investigations, and what you do in the event a special agent appears—

MR. SNOW:

Your Honor, we will object to this testimony; it seems self-serving and certainly not material to the issues in this matter.

THE COURT:

I don't think it is. I am not interested in all of your education background on this.

MR. COPLEY:

Your Honor, the only reason that I instituted—the only reason that I asked this was that I get the impression that the Government is trying (56) to create, that some of these documents were not executed on the dates they were exe-

cuted; I get the impression, from the questions they asked Mr. Kasmir about other matters with Mr. Candy, that they had a modus operandi in tax fraud cases, but that is the only reason I asked the question.

THE COURT:

Well, he said this is the first tax case he has been involved with, so I don't think that you have to prove that.

MR. COPLEY:

We have no further questions.

REDIRECT EXAMINATION

BY MR. SNOW:

Q. Now, Mr. Kasmir, are you aware that Dr. Mason does a big medical business—I am sorry I have to use that phrase—are you aware of that?

A. Yes, sir.

Q. Now, you indicated, I think, in your examination to counsel that his office was located in an undesirable neighborhood.

A. Yes.

Q. Is that so?

A. Yes, sir.

Q. Do you live down there?

A. No, sir, I don't.

(57) Q. Yourself?

A. No, sir, I don't.

Q. So, I see, and were you ever present when any theft occurred down there at that office?

A. No, but he has related many instances of theft in the area, and instances in his office, and he has also related to me that he is afraid to stay at his office at night because he is afraid of being mugged.

Q. Well, you are not familiar——

THE COURT:

Now, wait a minute. He just asked if you have been there.

A. I am sorry.

THE COURT:

He has asked you if you have been there during any thefts?

A. Had I been there during any theft?

Q. Yes.

A. No.

THE COURT:

He wasn't hired until the 3rd, so he wouldn't know.

MR. SNOW:

But, again, Your Honor, I am renewing my objection to that series of questions made by Counsel Copley, as to what the doctor may or may not have indicated to his counsel, Mr. Kasmir; it is hearsay and simply not admissible, in my opinion, into evidence.

(58) THE COURT:

I will overrule the objection. It is before the Court. Anything else?

MR. SNOW:

Nothing else, sir.

THE COURT:

Do you have anything else?

MR. COPLEY:

No, sir.

THE COURT:

Thank you, Mr. Kasmir.

THE WITNESS:

Thank you.

(Witness excused.)

MR. SNOW:

Your Honor, although I was premature before, at this point the Government rests.

THE COURT:

The Government rests?

MR. SNOW:

Yes, sir.

THE GOVERNMENT RESTS

THE COURT:

Do you have any testimony?

MR. COPLEY:

Your Honor, we have brought out in court on cross all of the matters we want to bring out.

THE COURT:

So, both sides close?

MR. SNOW:

Yes, sir.

MR. COPLEY:

Yes, sir.

TESTIMONY CLOSED

(59) THE COURT:

Let me hear from the Government their argument in this case.

ARGUMENT OF COUNSEL FOR PETITIONERS

MR. SNOW:

Your Honor, the case is similar to the Texas case cited in our Memorandum of Law filed right after I got the Answer yesterday.

The Texas case in the Southern District, the United States of America versus Baldridge, the citation listed.

Everything here, Your Honor, occurred after the parties —that is, the doctor and his accountant, Candy, were aware that there was a tax investigation.

I refer to it as the shell game to put the records out of the reach of the Government.

They went so far as to convene the three people, Kasmir, Candy, and the doctor, for a shuffle the next day there at the office, and then the records wind up at the attorney's office.

Then according to Baldridge, Zakutansky, according to Deck, according to a case I have in Michigan, Sixth District, Widalsky, this is not legitimate behavior, and the Court will not sanction this type of a thing.

(60) The key is not when the summons was served; it is when the taxpayer knew he was under investigation, the taxpayer and, of course, in this case, the accountant, and the evidence here shows without contradiction that that was known before the turnover and, in fact, caused the turnover.

In Widalsky, Your Honor, the information was known eighteen months prior to the summons—eighteen months prior; here we don't have it eighteen months prior, we have it one day prior, or one hour prior.

It simply is not legitimate behavior, and to carry it out to its logical conclusion would mean that the Government would never see any records, you see, because this circumstance would always happen as soon as an investigation occurred, the accident would move out the records through this process of handing them to the taxpayer, who hands them to his attorney; and then asserts the attorney-client privilege.

Of course, the attorney-client privilege is not relevant here. We have asked Mr. Kasmir for no such testimony, and have so indicated in this record.

We are asking him for all of those records which were already in existence prior to the time that relationship started. That is all we are asking.

What testimony are we asking from Candy?

(61) Explanatory testimony on the records, that is all; we are asking Candy nothing about anything that might have happened since his relationship in the instant case with Kasmir was convened; we don't want to know that.

The Fourth and Fifth Amendment arrests, that is covered by the Supreme Court in Couch.

When the accountant has the records, there is no Fourth or Fifth Amendment situation, that is what the Supreme Court simply says; we have the records here because he never legitimately turned them over, and if he did, he turned them over to the attorney and the taxpayer never had any legitimate possession and, again, if we were to concede that then it was done under an illegitimate means, according to the cases I have related.

Notwithstanding that, the taxpayer has not even appeared today to raise the Fourth and Fifth Amendments. So, we don't know where we really are; he has to raise it.

THE COURT:

He is not a party to these proceedings.

MR. SNOW:

No, sir, he isn't.

We don't have to disprove the negative, Your Honor; he never even raised it, but, in any event, we are relying upon Baldridge, Widalsky, all of these cases.

(62) I mean, I think, Your Honor, frankly, candidly, these cases explain where the facts are, and we hope we can have relief.

THE COURT:

Mr. Copley——

ARGUMENT AND SUMMATION OF COUNSEL FOR RESPONDENTS

MR. COPLEY:

Your Honor, the facts, I think, are apparent to you in this case.

Mr. Candy never had possession of '69 and '70; at the

time he was summonsed he did not have possession of any of those records; he was only an employee of the CPA firm.

Now, Mr. Kasmir, the attorney, had possession on behalf of his client.

Government Counsel says the Fourth and the Fifth Amendments have not been asserted.

We sure tried, Your Honor, because we have got it in our response that on behalf of the taxpayer and acting under the instructions of the taxpayer, Mr. Kasmir raised the Fourth and Fifth Amendments.

Couch, a Supreme Court case, which we think is entirely consistent and supportive of us, says, quote

"That the rights and obligations of the parties became fixed when the summons was served, and the (63) transfer did not alter that"—end quote.

The transfer in Couch was made after the service of the summons.

In Foster-Lewis, United States District Court for the Western District, cited in our amendment, Judge Spears stated that at the time—I will not quote him directly; more in short order, he stated that——

A the time the summons was issued the records were in the hands of the attorney.

And the big distinguishing factor between that case and ours is the two days ahead of time there, and one day here.

But, Judge Spears says, in his Order, that they were in the hands of the attorney acting for the taxpayer in purely representative capacity.

I don't think this case is one that, as Government counsel says, cries for relief, Your Honor, for the Government.

The taxpayer delivered these records, according to the instructions received by Mr. Kasmir, for the purpose of Mr. Kasmir protecting these records, and if you can't rely upon your attorney to protect the records, we don't know where we are under the law.

It seems to me that the Government had given a warning to the taxpayer in this case, and he has a right (64) to consult his attorney.

Now they complain and claim that the taxpayer is taking action based upon the advice of his attorney to preserve his constitutional rights.

I just don't think those two things match; it is clear

from the testimony, especially Mabry, that this is a criminal oriented investigation.

Now, in the concurring opinion—we don't rely on the concurring opinion in Couch entirely, Justice Brennan, but I think it is relevant.

If the taxpayer had possession of these records today and had had it continuously from the time that Mr. Candy delivered them to him, I would presume the Government would not try to collect those records from the taxpayer.

The taxpayer has the right to keep those records in a safety deposit box, subject to his dominion and control;

He has the right to keep them in his office, subject to his dominion and control, and at this own risk, I suppose, from theft;

But he has the right to keep them in his office, in a safe deposit box, to hire a bailee, custodian, to keep them for him, and we think that, if anything, the right to put them with his attorney to protect (65) them is stronger than any of these other reasons.

THE COURT:

You are saying he put them with Mr. Kasmir to protect them for what reason?

MR. COPLEY:

To protect them for two reasons:

First, and I think primary, to take them in reverse order of the testimony, but, primarily, to protect them, in reliance on his Fourth and Fifth Amendment rights, from the Government investigation, all of which was done prior to the service of the summons.

We don't claim, Your Honor, this was done accidentally; we knew—Mr. Kasmir and Mr. Candy—at the time they knew what they were doing, I think the evidence would reflect, and the records were in the possession of the taxpayer; he gave them to Mr. Kasmir for the purpose of protecting them from this Government audit.

Now, we don't see any illegitimacy under that type of a transfer, neither did Judge Spears in the Foster-Lewis case.

Couch, the Supreme Court case, which is the latest case, January of this year, on all of these matters—

Couch says that the rights of the parties became fixed at the time the summons was served. Now——

THE COURT:

Well, they were in Kasmir's custody (66) at that time?

MR. COPLEY:

At that time, Your Honor.

Now, the Government says it has no remedy in this matter.

I am not trying to tell the Government how to conduct its audits.

There would have been no prohibition for the Government to issue a subpoena or summons when they walked into Dr. Mason, and they could have walked out—a summons is not the most difficult document in the world to prepare, and they could have gone down and served Mr. Candy or Mr. Kasmir, but they didn't have those documents—Mr. Kasmir didn't have them on the 3rd.

They could have served Mr. Candy, and if he had possession of them on the 3rd, as he did, and on the basis of Couch, we would have no standing to say that Mr. Candy, as the accountant, could protect those records.

THE COURT:

What is the difference between Kasmir and Candy?

MR. COPLEY:

Mr. Kasmir here stands in a different capacity here from Mr. Candy.

First, he is an attorney, who was hired by Dr. Mason to protect the records.

(67) Now, Your Honor, we think that Dr. Mason could have hired a national bank in Dallas and used their safety deposit box, and those documents would have been in Dr. Mason's possession, even though they were physically situated in downtown Dallas.

If he can do that with a bank, with a bailee—I mean, he doesn't have to carry the records around all of the time to have possession—

Then it would seem to me that he can certainly do that with his duly authorized attorney hired for that very purpose.

We think that he could do that by hiring someone as an employee who is not an attorney, to keep custody of the records on behalf of Dr. Mason.

We certainly think that he can hire an attorney to take possession of those records from Dr. Mason for the express purpose of protecting them from this audit.

We just don't see the difference—

THE COURT:

What do you mean, hiring them to protect them from the audit?

MR. COPLEY:

Criminal investigation.

THE COURT:

You mean, just to keep them away from the Government? On what basis can he protect them from the audit? That is what I want to know.

MR. COPLEY:

Well, let us suppose that the records (68) never left Dr. Mason's possession.

We say that if the Government came to Dr. Mason and he had possession of the records, that Dr. Mason could successfully assert the Fourth and Fifth Amendments.

All right. He, Dr. Mason, transferred the physical possession to Mr. Kasmir, but he didn't transfer possession unrestricted from Dr. Mason's control; he directed them to Mr. Kasmir for the express purpose that Mr. Kasmir, as his attorney and representative, assert the Fourth and Fifth Amendments.

We don't think that the fact that Mr. Mason—Dr. Mason—

THE COURT:

How can he assert Dr. Mason's Fourth and Fifth Amendment rights?

MR. COPLEY:

In a representative capacity, Your Honor, when he is summonsed to produce records that do not belong to him. They do not belong to Mr. Kasmir; they belong to the taxpayer. They have been delivered conditionally to Mr. Kasmir.

THE COURT:

Suppose he delivered them to Mr. Candy and said, "I want you to assert my Fourth and Fifth Amendment privileges"?

MR. COPLEY:

He didn't.

THE COURT:

Suppose he did?

(69) MR. COPLEY:

I think if he did we would be on weaker ground, Your Honor.

THE COURT:

What makes it any different because Mr. Kasmir has them, as opposed to Mr. Candy?

MR. COPLEY:

Well, Your Honor, I suppose the facts of the cases. There are some cases that where the records end back up in the hands of the accountant, the cases tend to hold that they never really left the accountant.

Now, here there doesn't seem to be any question that they left the possession of the accountant.

The accountant, of course, is not an attorney.

We think that the taxpayer, if he is unable to hire an attorney, that the Government, in effect, warns him he has the right to do, then he is left defenseless in a case like this.

There is Couch there is language that if records are stolen from the taxpayer, and without any connivance, so to speak, the Government legitimately seizes those records in the hands of the thief, there is language in Couch to indicate that the Government can use those records and that the taxpayer, because he doesn't have possession, doesn't have the right to assert the Fifth Amendment.

In this case the taxpayer's clear intent was to (70) preserve and enhance his right to assert the Fifth Amendment.

That is the reason we think that Mr. Kasmir is standing in the taxpayer's shoes under instructions as an attorney to protect him under the Fourth and Fifth Amendment.

We also think, Your Honor, in—I don't know that it is controlling. I think it is highly significant.

Mr. Candy, as to '68 and '69, just didn't have the records; never had them; they didn't belong to him; he was an employee.

Surely they couldn't serve Mr. Kasmir's secretary because she may have had access to these records in his files and claim that she has got to produce them, because she is not an attorney.

Your Honor, this case has developed rapidly; the petition was filed last Thursday, I believe—I mean, served last Thursday; we filed our response on the date ordered by the Court.

If the Court would choose, we would welcome the opportunity to file more detailed briefs on this matter, but we think the issues as set forth in Couch, as buttressed by

a case which is as nearly in point as any case, Foster-Lewis, as we have cited, is almost the exact fact situation, except there was two days (71) circumstances, and that it is controlling.

The Government is complaining of the sequence of events on the time. It should make no difference.

The fact that the Government moves fast or slow, if they had not chosen to see Mr. Candy or Mr. Kasmir for six months, that is really not controlling.

The fact is that when they did see them and they saw Mr. Candy, he did not have possession, and when they served Mr. Kasmir, he had possession only on instructions from the taxpayer to protect these records.

That is our argument, Your Honor, and we respectfully request the Court to deny the relief sought.

THE COURT:

All right. I will hear from you briefly. Here in your notice you ask that—or in the summons, insofar as it relates to Candy, it provides that Candy is to appear for testimony, is that correct?

MR. SNOW:

Yes, Your Honor. Explanatory testimony concerning the records involved.

THE COURT:

All right. Go ahead.

FINAL ARGUMENT AND SUMMATION OF COUNSEL FOR PETITIONERS

MR. SNOW:

First, Your Honor, we have to distinguish what records we are talking about here.

Counsel made reference to the summons served upon (72) the taxpayer, Mason, for records in the doctor's office.

We are not seeking those records; we would be faced with futility, obviously, as he would have the privilege against self-incrimination, and we don't do needless acts usually.

We are talking about the records which belong to the accountant; they belonged to the accountant because nobody indicated otherwise.

And I would cite, Your Honor, the Zakutansky case cited in our brief, at page 78, and it states, and I quote verbatim——

"Accountants' work papers are property of the accountants unless shown to the contrary."

Here, certainly, if you please, up to the evening of January 3rd or January 4th, there is no question but that all of these records which we are seeking were accountants' records. There is no question, either, that the summons was directed to the Tannebaum firm and Jerry Candy.

There is no question, and Candy says here on the stand that he had access to all of these records.

I think that counsel is making some type of semantical argument, and I want to be sure what records we are talking about.

We are not talking about Mason's ones which he (73) was retaining in his office and which he withdrew from the agent, but the ones which had been certainly since 1969 and on down at the accountants' office, and there they remained; there they remained consistently.

We didn't hear otherwise; they were there consistently until January 4th.

Now counsel will refer to Couch and other cases concerning protection of taxpayers and so on, but counsel states the conclusion—certainly, if records had been in the possession of the attorney prior to the time that the taxpayer or anybody else found out about the investigation the Government would be in a much tougher spot, but that wasn't the case.

I might remark, Your Honor, that in Couch, on looking at Couch, which is attached to our brief, on September 18th the parties in Couch found out about the investigation—the accountants who had the records in Couch; Couch's accountants records; okay.

They found out on the 18th, and the summons was served on the 18th. Okay?

The records were then moved over; they were moved over to the attorney, and the Court said, simply——

"The taxpayer never had legitimate possession of these"—and I quote——

"The ingredients of personal compulsion against an (74) accused is lacking. The summons and the order of the District Clerk are directed against the accountant."

Is not that the same thing here, Your Honor, because here we have the additional factor of knowledge; in Couch

the knowledge occurred on the date of the summons; in this case it didn't.

This case is akin to the Baldridge case in Texas, the many other cases, the Widalsky case.

That is the difference. Couch, of course, ruled in favor of the Government.

Now, our position is in accord with Couch, also, because these were accountants; papers, Your Honor.

Couch states, and I quote——

"The Fifth Amendment is a personal privilege that adheres basically to the person and not to the information which may incriminate him."

As Justice Holmes put it, a party is privileged from producing the evidence, but not from its production.

Dr. Mason was privileged from production of what he held in his office; we know that; but he is not privileged from the conducting of a legitimate investigation of the accountants' records, and that is what they were; that is what they were.

I reiterate, Your Honor, and respectfully submit (75) that no additional briefs are needed, and the facts are clear as to what happened.

I consider it, frankly, rather insulting to imply that the Internal Revenue must assume that these type of things happen consistently, and that as soon as they contact the taxpayer, they should run to the accountant and immediately summons him. I don't think that is correct.

I have no further remarks.

THE COURT:

I am going to grant the relief prayed for by the Government.

I feel that these are records of the accountant that are being requested, and I believe, under Couch, that the Fourth and Fifth Amendment privileges are not applicable in this case.

I feel that, first, they are the accountant's records, and that is all that is being asked for; and

The taxpayer can't make them a part of his records by requesting the accountant to deliver them to him.

I also find that at the time the summons was served the records were in the possession of Mr. Kasmir, and that,

being in his possession, the Government is entitled to obtain the records from Mr. Kasmir.

MR. SNOW:

May I prepare an order, Your Honor?

THE COURT:

Well, I am going to direct the (76) Government to prepare an order.

I am going to suggest that Mr. Mabry work out some convenient time with Mr. Candy and Mr. Kasmir as to their appearances, at some reasonable time, and accommodate both sides.

MR. COPLEY:

Your Honor, the taxpayer intends to appeal this case.

THE COURT:

All right.

MR. COPLEY:

After the Court enters its order, may we ask for a stay, pending appeal?

THE COURT:

Yes. I will give you a stay pending appeal.

MR. COPLEY:

Thank you.

MR. SNOW:

If that is the order, Your Honor, may we—we would like to submit something on that. May we ask that the records involved be placed in the custody of the Court and the Court retain them?

THE COURT:

Well, Mr. Kasmir has the records, and he is an officer of this Court, and I am not concerned about it, anything happening to the records. He is an officer of the Court, and I am satisfied that he will preserve those records as existed at the time they were delivered to him. I am going to deny that request.

MR. SNOW:

Your Honor, I will get together with (77) counsel and we will arrange a time, and I will have the order on your desk at that time.

THE COURT:

All right. You can have the order as promptly as you want to, and then you can make your appeal, Mr. Copley.

MR. COPLEY:

Yes, Your Honor. There is no need to arrange a meeting,

because that is the whole purpose of the appeal.

THE COURT:

Well, just prepare your order. I think your order will provide that they are to appear and appear at the direction of the Internal Revenue Service, or if you want to put a specific time and place, you can include it in the order.

MR. SNOW:

Your Honor, I would have one further request. As His Honor knows, there is a six-year statute of limitations here, and we are looking at 1969, and the statute continues to run. If a stay is to be granted, we would like to be heard on it, but, in any event, if one is granted, we would ask that an expeditious appeal be made.

THE COURT:

I am for that, for an expeditious appeal, but you had better take that up with the Court of Appeals, because once I sign this order, I won't have anything to do with it.

I think if you file a motion for an expeditious (78) appeal, they will give it to you. The Fifth Circuit is rather accommodating.

MR. COPLEY:

Your Honor, we have no objection to a prompt disposition of the case on appeal. I might say, the limitation doest run until 1976, for the earliest year involved.

THE COURT:

Is it six years?

MR. COPLEY:

From the time of filing the return.

MR. SNOW:

That is correct.

THE COURT:

In 1970 he filed the return?

MR. COPLEY:

For 1969.

THE COURT:

All right.

MR. COPLEY:

The earliest it could run would be April of 1976.

THE COURT:

Well, I believe it will be over with by then.

BY COPLEY:

I would think so.

MR. SNOW:
It hasn't started yet, Your Honor. We hope so.
THE COURT:
All right. You get your order down. The quicker you get your order in, the quicker the appeal will start.
MR. SNOW:
All right.

THE COURT:
Thank you, Mr. Kasmir, Mr. Candy, Mr. Mabry.
(79) All right. We will be in recess until 1:30 this after-

END OF PROCEEDINGS

CERTIFICATE

I, CECIL J. LOWRANCE, certify that during the foregoing proceedings I was the official shortland reporter and took in shorthand the proceedings at the Hearing on Petition to Enforce Internal Revenue Service Summons and have transcribed same as shown by the above and foregoing seventy-nine pages; and that said transcript is true and correct.

Dated this 9th day of April, A. D. 1973.

s/ Cecil J. Lowrance
CECIL J. LOWRANCE
Official Shorthand Reporter
U. S. District Court

[Government Exhibit 1]

Form 2039 (Rev. Oct. 1969)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of
EDWARD J. and RAE A. MASON
2516 Forest Ave. (or)
2207 Millerwood, Dallas, Texas

Internal Revenue District of Dallas, Texas

Period(s) 1969, 1970, and 1971

GOVERNMENT EXHIBIT 1

73-1973

The Commissioner of Internal Revenue

To Jerry A. Candy
Tannebaum Bindler & Lewis
At Dallas, Texas

Greetings: You are hereby summoned and required to appear before James S. Mabrey, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Testimony.

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971.

Place and time for appearance:
at Room 11C47, 1100 Commerce, Dallas, Texas
on the 15th day of January, 19 73 at 9:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code
this 5 day of JANUARY, 19 73

Original — James S. Mabrey, Special Agent
Signature — Title

Form 2039 (Rev. 10-69)

BEST COPY AVAILABLE

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
1-5-73	0905

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature	Title
James S Mabrey	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 2039 (Rev. 10-68)

[Government Exhibit 2]

Form 2039 (Rev. Oct. 1968)

Summons

Department of the Treasury
Internal Revenue Service

GOVERNMENT EXHIBIT 2

'73 JAN 1973

In the matter of the tax liability of
EDWARD J. and RAE A. MASON
2516 Forest Ave. (or)
2207 Millersmore, Dallas, Texas

Internal Revenue District of Dallas, Texas

Period(s) 1969, 1970, and 1971

The Commissioner of Internal Revenue

To C. D. Kasmir

At Fishman and Associates, Dallas, Texas

Greetings: You are hereby summoned and required to appear before James S. Mabrey, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

the following records of Tennebaum Binder & Lewis.

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.

2. Retained copies of E. J. Mason's income tax returns for 1969, 1970, and 1971.

3. Retained copies of reports and other correspondence between Tennebaum Binder & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971.

Place and time for appearance:

at Room 11G47, 1100 Commerce, Dallas, Texas

on the 15th day of January, 19 73 at 9:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 5 day of JANUARY, 19 73

Original

James S Mabrey
Signature

Special Agent
Title

Form 2039 (Rev. 10-68)

BEST COPY AVAILABLE

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
1-5-73	0830

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature	Title
J Edward A Mabrey	Special Agent

Sec. 7603

Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 3038 (Rev. 10-68)

[Government Exhibit 3]

GOVERNMENT EXHIBIT 3

At the time I was served with the Summons by Special Agent James S. Mabrey of the Internal Revenue Service I did not possess any of the following records of Tannebaum, Bindler & Lewis:

(1) Accountant's work papers pertaining to Dr. E.J. Mason's books and records of 1969, 1970 and 1971.

(2) Retained copies of E.J. Mason's income tax returns for 1969, 1970 and 1971.

(3) Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E.J. Mason during 1969, 1970 and 1971.

Prior to the time that I was served with the Summons and in response to the request of Dr. Edward J. Mason, I delivered all of the above-described documents to Dr. Edward J. Mason.

I am presently in the employ of the lawfirm of Fischman, Rosenberg & Kasmir to assist them in analyzing the books, records, papers and documents of Dr. Edward J. and Rae A. Mason and the business, financial and personal affairs of the said Masons insofar as the said Attorneys may deem such assistance to be necessary in the preparation and presentation of the Mason's case. In this capacity, I respectfully refuse to answer any questions at this time based on the attorney-client privilege.

Jerry A. Landy

Jerry A. Landy, C.P.A.

Dated: January 15, 1973

[Government Exhibit 4]

GOVERNMENT EXHIBIT

On January 3, 1973, I was employed by Dr. Edward J. and Rae A. Mason to represent them with respect to their income tax liability for the years 1969, 1970 and 1971, in connection with the audit of their income tax returns and examination presently being made by the Internal Revenue Service.

By virtue of said employment, I respectfully refuse to answer any questions at this time based upon the attorney-client privilege.

Furthermore, on behalf of my clients, I respectfully refuse to produce any documents, books, records or papers at this time based upon the Fourth Amendment's protection against unreasonable searches and seizures and upon the Fifth Amendment's privilege against self-incrimination.

Cyril David Kasmir

Cyril David Kasmir
Attorney at Law

Dated: January 15, 1973

[Government Exhibit 5]

GOVERNMENT EXHIBIT 5

Form **2848** (Rev. Jan. 1970) Department of the Treasury Internal Revenue Service

Power of Attorney

(See Separate Instructions)

Name, address including ZIP code, and identifying number of taxpayer(s)

Edward J. & Rae A. Mason 296-14-7029
2516 Forest Avenue
Dallas, Texas 75215

hereby appoints (name, address including ZIP code, and telephone number of appointee(s))

Cyril D. Kasmir	Jerry A. Candy	Samuel H. Tannebaum
601 Kirby Building	1407 Main, Suite 1422	1407 Main, Suite 1422
Dallas, Texas 75202	Dallas, Texas 75202	Dallas, Texas 75202
214/744-5511	214/748-2233	214/748-2233

as attorney(s)-in-fact to represent the taxpayer(s) before any office of the Internal Revenue Service with respect to (specify Internal Revenue tax matters and years or periods):

Income Tax 1969, 1970, 1971

Said attorney(s)-in-fact (or either of them) shall, subject to revocation, have authority to receive confidential information and full power to perform on behalf of the taxpayer(s) the following acts with respect to the above tax matters:

(Strike through any of the following which are not granted.)

To receive, but not to endorse and collect, checks in payment of any refund of Internal Revenue taxes, penalties, or interest.
To execute waivers (including offers of waivers) of restrictions on assessment or collection of deficiencies in tax and waivers of notice of disallowance of a claim for credit or refund.
To execute consents extending the statutory period for assessment or collection of taxes.
To execute closing agreements under section 7121 of the Internal Revenue Code.
To delegate authority or to substitute another representative.

Other acts (specify) _____

Copies of notices and other written communications addressed to the taxpayer(s) in proceedings involving the above matters should be sent to (Name, address including ZIP code, and telephone number):

and	Cyril D. Kasmir 601 Kirby Building Dallas, Texas 75202 214/744-5511	Jerry A. Candy 1407 Main, Suite 1422 Dallas, Texas 75202 214/748-2233	Samuel H. Tannebaum 1407 Main, Suite 1422 Dallas, Texas 75202 214/748-2233

This power of attorney revokes all prior powers of attorney and tax information authorizations on file with the same Internal Revenue office with respect to the same matters and years or periods covered by this instrument, except the following:

_____
(Specify to whom granted, date, and address including ZIP code, or refer to attached copies of prior powers and authorizations)

Signature of or for taxpayer(s)

If signed by a corporate officer, partner, or fiduciary on behalf of the taxpayer, I certify that I have the authority to execute this power of attorney on behalf of the taxpayer.

_____ (Title, if applicable) 1/3/73 (Date)
(Signature)

_____ (Title, if applicable) 1/3/73 (Date)
(Signature)

Form **2848** (Rev. 1-70)

If the power of attorney is granted to an attorney, certified public accountant, or enrolled agent, this declaration must be completed.

I declare that I am not currently under suspension or disbarment from practice before the Internal Revenue Service, and that:

I am a member in good standing of the bar of the highest court of the jurisdiction indicated below; or
I am duly qualified to practice as a certified public accountant in the jurisdiction indicated below; or
I am enrolled as an agent pursuant to the requirements of Treasury Department Circular No. 230.

Designation (Attorney, C.P.A., or Agent)	Jurisdiction (State, etc.) or Enrollment Card Number	Signature	Date
Attorney	Texas	Lyle Davis Kasw	1-3-73
CPA	Texas	Samuel H. Tannenbaum	1-3-73
CPA	Texas	Jerry A. Cuidy	1-3-73

If the power of attorney is granted to a person other than an attorney, certified public accountant, or enrolled agent, it must be witnessed or notarized below.

The person(s) signing as or for the taxpayer(s): (Check and complete one.)

☐ is/are known to and signed in the presence of the two disinterested witnesses whose signatures appear here:

(Signature of Witness) (Date)

(Signature of Witness) (Date)

☐ appeared this day before a notary public and acknowledged this power of attorney as his/her/their voluntary act and deed.

(Signature of Notary) (Date) NOTARIAL SEAL (If required)

U.S. GOVERNMENT PRINTING OFFICE : 1988—O-211-511

[Government Exhibit 6]

January 3, 1973

Tannebaum, Bindler & Lewis
1422 Metropolitan Savings Building
Dallas, Texas 75202

Gentlemen:

Please accept this as receipt for the following files of Dr. E. J. Ourso 1969, 1970 and 1971 Tax Files, Quarterly Tax Files, and Bookkeeping Files. 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements.

GOVERNMENT EXHIBIT 6

Dr. E. J. Ourso

[Government Exhibit 7]

EMPLOYMENT AGREEMENT 78-

THIS EMPLOYMENT AGREEMENT entered into at Dallas, Texas this 3rd day of January, 1973, by and between CYRIL DAVID KASMIR (hereinafter referred to as "the Attorney") and JERRY A. CANDY (hereinafter referred to as "the Accountant").

W I T N E S S E T H:

WHEREAS, the Attorney has been employed by DR. EDWARD J. and RAE A. MASON (hereinafter referred to as the "Clients") to represent them in the matter of their federal income tax liabilities for the years 1969, 1970 and 1971, in connection with an audit of their income tax returns presently being made by the Internal Revenue Service, and

WHEREAS, in carrying out his duties and responsibilities pursuant to such employment the Attorney will require accounting assistance in analyzing the books, records, papers and documents which have been delivered to him by the Clients and to have accounting assistance in preparing schedules, workpapers and other documents which when prepared will represent the product of the Attorney's work in preparing and presenting the case of the Clients,

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and undertakings hereinafter set forth, the Attorney and Accountant do hereby agree as follows:

1. The Attorney employs the Accountant to assist the Attorney in analyzing the books, records, papers and documents of the Clients and the business, financial and personal affairs of the Clients insofar as the Attorney may deem such assistance to be necessary in the preparation and presentation of the Client's case.

2. The Attorney agrees to pay the Accountant a reasonable fee for all such services actually rendered and performed by the Accountant pursuant to the Attorney's request.

3. (a) All books of account, records, papers and other documents belonging to the Clients and all memoranda, workpapers or other documents prepared by the Attorney which pertain to the affairs of the Clients which may be delivered by the Attorney to the Accountant in the course of the Accountant's employment shall be and remain the property of the Clients or the Attorney, as the case may be, and the Accountant shall be the gratuitous bailee thereof.

(b) All notes, workpapers, schedules, analyses and other documents prepared by the Accountant for use by the Attorney in the presentation of the Clients' case shall become the property of the Attorney immediately upon their preparation by the Accountant, whether or not such documents are complete or incomplete and irrespective of who purchased or paid for the component parts thereof, in the same manner and to the same extent as though such documents had been prepared by the Attorney and the component parts thereof purchased and paid for by the Attorney, and the Accountant shall be the gratuitous bailee thereof.

(c) Under no circumstances shall the accountant permit anyone other than the Attorney to examine, inspect or copy or take possession of any of the records and documents referred to in paragraphs 3 (a) and 3 (b) hereof.

4. The bailment to the Accountant of all records and documents referred to in paragraph 3 above shall be automatically revoked and the Accountant shall at once deliver to the Attorney all such records and documents upon the happening of any one of the following events:

(a) A request by the Attorney for the return of such records and documents;

(b) The exhibition to or surrender of any of such records and documents by the Accountant to anyone other than the Attorney;

(c) A request by anyone other than the Attorney (including, but without being limited to, a creditor of the Clients and

a representative of any agency of the United States Government) to examine, inspect or copy any of such records and documents, or for the possession of any of such records and documents;

(d) Any attempt to serve, or the actual service of, any court order, subpoena or summons, or any administrative subpoena or summons upon the Accountant which rpquires or purports to require him to produce any of such records and documents.

5. Should any litigation result from the failure or refusal of the Accountant to comply with the requests, orders, subpoenas or summons referred to in paragraphs 4 (c) and 4 (d) hereof, the Attorney agrees, if requested by the Accountant, to defend the Accountant in such litigation at the Attorney's cost and expense.

IN TESTIMONY WHEREOF, witness the signatures of the parties hereto the day and year first above written.

CYRIL DAVID KASMIR
ATTORNEY

JERRY A. CANDY
ACCOUNTANT

BEST COPY AVAILABLE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA and JAMES S. MABREY, Special Agent, Internal Revenue Service, PETITIONERS v. C. D. KASMIR and JERRY A. CANDY, RESPONDENTS	Civil Action No. CA-3-6973-D (Filed: March 28, 1973)

This matter having come on for hearing before the undersigned on March 28, 1973, pursuant to the petition and affidavit of petitioners and on order of the District Court to show cause, the parties having been heard and the Court finding that the records described in the two Internal Revenue summonses at issue belong to the accounting firm of Tannebaum, Binder, and Lewis and are in possession of the respondent, C. D. Kasmir, it is

ORDERED that C. D. Kasmir obey the summons served upon him on January 5, 1973, by the petitioner, Special Agent James A. Mabrey, by appearing before Special Agent Mabrey on April 16, 1973, at 10:00 A.M., at room 11G47, 1100 Commerce, Dallas, Texas, then and there to produce for inspection all of the accountant's work papers, reports, tax returns and documents described in the aforementioned summons. It is further

ORDERED that the respondent, Jerry A. Candy, obey the summons served upon him on January 5, 1973, by Special Agent Mabrey, by appearing before the said agent at the same time and place as C. D. KASMIR, then and there to testify as concerns the described accountant's records.

s/ Robert M. Hill

UNITED STATES DISTRICT JUDGE

Dated: March 28, 1973

MOTION FOR STAY

(Number and title omitted) (Filed: April 6, 1973)

The Respondents, C. D. KASMIR and JERRY A. CANDY, move the Court to stay enforcement of its Order in this action pending the disposition of the Respondents' appeal to the United States Court of Appeals for the Fifth Circuit and for that purpose to fix the amount of the bond required to be filed by the Respondents.

AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Building
Dallas, Texas 75201
741-2111

By s/ Edward A. Copley
EDWARD R. COPLEY

ATTORNEY FOR THE RESPONDENTS

FISCHMAN, ROSENBERG, KASMIR & WILLINGHAM
601 Kirby Building
Dallas, Texas 75201
744-5511

By s/ Cyril David Kasmir
CYRIL DAVID KASMIR
PRO SE

ORDER GRANTING STAY

(Number and title omitted) (Filed: April 6, 1973)

This cause came on to be heard on the Motion of the Respondents, C. D. KASMIR and JERRY A. CANDY, for a stay pending the Respondents' appeal to the United States Court of Appeals for the Fifth Circuit, and it appearing to the Court that the Respondents are entitled to such a stay, it is

ORDERED that the compliance with, the execution of and any proceedings to enforce the Order entered herein on March 28, 1973, be stayed pending the determination of the Respondents' appeal from such Order, provided that

the Respondents post a cash deposit in the sum of $250.00, in lieu of a bond, on or before April 9th, 1973.

DATED: April 6th, 1973.

s/ Robert M. Hill
UNITED STATES DISTRICT JUDGE

RESPONDENT'S BOND

(Number and title omitted) (Filed: April 16, 1973)

WHEREAS C. D. KASMIR and JERRY A. CANDY have requested and the Court has issued an Order Granting Stay whereby the compliance with, the execution of and any proceedings to enforce the Order entered herein on March 28, 1973, were stayed pending the determination of the Respondent's appeal from said Order, provided that the Respondents post a cash deposit in the sum of $250.00, in lieu of bond, on or before April 9, 1973.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS that C. D. KASMIR and JERRY A. CANDY, the Respondents, do hereby acknowledge that they have deposited with the office of the United States District Clerk at Dallas the sum of TWO HUNDRED FIFTY DOLLARS AND NO/100 ($250.00), in cash, on April 6, 1973, pursuant to the Order of this Court.

FISCHMAN, ROSENBERG, KASMIR & WILLINGHAM
601 Kirby Building
Dallas, Texas 75201
744-5511
By s/ Cyril David Kasmir
CYRIL DAVID KASMIR

Approved this the 16th
day of April, A.D., 1973.
UNITED STATES DISTRICT COURT CLERK FOR THE NORTHERN DISTRICT OF TEXAS AT DALLAS
By s/ Harriet Wilson
Deputy Clerk

NOTICE OF APPEAL

(Number and title omitted) (Filed: April 16, 1973)

Notice is hereby given that C. D. KASMIR and JERRY A. CANDY, the Respondents above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order directing the Respondents to obey the summons served upon them by Special Agent JAMES A. MABREY entered in this action on the 28th day of March, 1973.

DATED: April 16th, 1973.

AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Building
Dallas, Texas 75201
741-2111

By: s/ Edward A. Copley
EDWARD A. COPLEY
ATTORNEY FOR THE RESPONDENTS

FISCHMAN, ROSENBERG, KASMIR & WILLINGHAM
601 Kirby Building
Dallas, Texas 75201
744-5511

By: s/ Cyril David Kasmir
CYRIL DAVID KASMIR
PRO SE

SUPREME COURT OF THE UNITED STATES

No. 74-611

UNITED STATES et al.,
PETITIONERS,

v.

C. D. KASMIR AND JERRY A. CANDY

ORDER ALLOWING CERTIORARI. Filed January 27, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is consolidated with No. 74-18 and a total of one hour is allotted for oral argument.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U.S. Government Printing Office: 1975—570-881/124

Supreme Court, U. S.
FILED
JAN 7 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

EDWARD A. COPLEY
ROBERT E. GOODFRIEND
2800 Republic Nat'l. Bank Bldg.
Dallas, Texas 75201

CYRIL D. KASMIR
2300 Main Tower
Dallas, Texas 75202
Attorneys For Respondents

Of Counsel:
AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Of Counsel:
ROSENBERG, KASMIR & WILLINGHAM
2300 Main Tower,
Dallas, Texas 75202

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Statutes Involved 1

Questions Presented 2

Statement of the Case 2

Reasons for Denying the Writ 7

I. The Issue in this Case is Neither Controversial Nor Does It Represent a Threat to the Conduct of Tax Investigations 7

A. The Government Erroneously Characterizes the Issue in This Case 8

B. This Case Presents No Issue of Any Real Importance to the Conduct of Federal Tax Investigations and Is Not Likely To Recur With Any Frequency 11

II. No Direct Conflict With a Decision of Another Court of Appeals Is Presented By This Case 12

A. The Cases Are Distinguishable On the Issue of Rightful Possession 13

B. The Cases Are Distinguishable on the Issue of Standing 14

III. The Standing Question Does Not Merit Consideration By This Court 15

A. The Courts of Appeals Have Adequately Resolved the Standing Question 15

Page

B. The Position Urged by the Government Is Not in Accord With Decisions of This Court and Is Wasteful of Limited Judicial Resources 17

C. While This Court Has Never Required Intervention, Its Sanction of the Intervention Procedure Makes It Unlikely That the Standing Issue Will Recur With Any Frequency in the Future 19

D. The Government's Reasons For Requiring Intervention Will Not Withstand Scrutiny 19

E. Since the Standing Issue is Largely of the Government's Own Making and Within Its Control, It Should Not Be Allowed to Impair the Taxpayers' Substantive Rights 20

IV. Conclusion 21

Certificate of Service 23

Cases: Page

Alma-Schuhfabrik AG v. Rosenthal, 25 F.R.D. 100 (E.D. N.Y. 1960) 21

Application of House, 144 F. Supp. 95 (N.D. Cal. 1956) 10

Balistrieri v. United States, 394 U.S. 985, 89 S. Ct. 1463, 22 L. Ed. 2d 761 (1969) 18

Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D. N.Y. 1951) 20

Bouschor v. United States, 316 F. 2d 451 (8th Cir. 1963) 15

Boyd v. United States, 116 U.S. 616 (1886) 11

Brody v. United States, 243 F. 2d 378, 387 n. 5 (1st Cir. 1957), cert. den., 354 U.S. 923 (1957) 16

Colton v. United States, 306 F. 2d 633, 639 (2d Cir. 1962), cert. den., 371 U.S. 951 (1963) 10, 16

Couch v. United States, 409 U.S. 322, 328 (1973) 9, 11, 12, 13, 19, 20, 21

Deck v. United States, 339 F. 2d 739, 740 (D.C. Cir. 1964), cert. den., 379 U.S. 967 (1965) 13

Donaldson v. United States, 400 U.S. 517, 531 (1971) 17

Drehle v. Fleming, 274 N.E. 2d 53 (Ill. Sup. Ct. 1971) 20

Ex parte Lipscomb, 239 S.W. 1101, 1103 (Tex. Sup. Ct. 1922) 17

Gould v. United States, 255 U.S. 298 (1921) 2

Harris, Matter of, 221 U.S. 274 (1911) 10

Hughes v. Foster, Lewis, Langley & Onion, ... F. Supp. ....., 65-1 U.S. T.C., ¶9418 (W.D. Tex. 1965) .. 10

In re Grant, 198 F. 708, 709 (S.D. N.Y. 1912), aff'd., 227 U.S. 74 (1913) 13

In re National Public Utility Investing Corporation, 79 F. 2d 302 (2d Cir. 1935) 21

Page

In re Rivera, 79 F. Supp. 510 (S.D. N.Y. 1948) 21

In re Ruppert ,309 F. 2d 97, 98 (6th Cir. 1962) 20

McCarthy v. Arndstein, 266 U.S. 34, 41 (1924) 10, 11

Murphy v. Waterfront Commission of New York, 378 U.S. 52, 79 (1964) 18

People v. Minkowitz, 220 N.Y. 399, 115 N.E. 987 (1917) 10

Reisman v. Caplin, 375 U.S. 440, 449 (1964) 19

Schwimmer v. United States, 232 F. 2d 855, 863 (8th Cir. 1956), cert. den., 352 U.S. 833 (1956) 17, 21

Unger v. Los Angeles Transit Lines, 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960) 20

United States v. Cohen, 388 F. 2d 464 (9th Cir. 1967) 8, 13

United States v. Fisher, 500 F. 2d 683 (3d Cir. 1974) 13, 14

United States v. Judson, 322 F. 2d 460, 462 (9th Cir. 1963) 7, 8, 10, 12, 16

United States v. Newman, 441 F. 2d 165, 174 (5th Cir. 1971) 18

United States v. Riland, 364 F. Supp. 120, 121-122 (S.D. N.Y. 1973) 13, 16

United States v. Tarlowski, 305 F. Supp. 112, 124 (E.D. N.Y. 1969) 2

United States v. White, 322 U.S. 694 (1944) 20

United States v. White, 477 F. 2d 757, 766 n. 4, (5th Cir. 1973) (dissenting opinion), aff'd. per curiam en banc, 487 F. 2d 1335, cert. den., Oct. 15, 1974 16

Williams v. Consolidated Investors, Inc., 472 P. 2d 248 (Kan. Sup. Ct. 1970) 20

Wong Sun v. United States, 371 U.S. 471 (1963) 18

Page

Constitutional Provisions, Statutes and Regulations:

U. S. Constitution, Fourth and Fifth Amendments 1

Internal Revenue Code of 1954, 26 U.S.C., Sections 7402(b), 7602, 7604(a) 2, 5

Internal Revenue Code of 1954, Reg. Section 1.6065-1(b)(1) 12

IRS News Release IR-949 (1949), CCH Fed. Tax Rptr. ¶ 6946 2

Texts and Law Reviews: Page

Lay, Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations, 21 U. Miami L. Rev., 854, 864 (1967) 16

Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 471 (1953) 13

8 Wigmore, Evidence, §2307 ..... 10, 16

8 Wigmore, Evidence, §2321 17

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 499 F. 2d 444.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth and Fifth Amendments of the United States

Constitution. Sections 7402(b), 7602, and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C.

QUESTIONS PRESENTED

1. Whether possession of records by the taxpayer's attorney previously in the actual possession of the taxpayer constituted sufficient constructive possession by the taxpayer to warrant his assertion of the privilege against self-incrimination.

2. Whether taxpayer's attorney had standing to raise taxpayer's privilege against self-incrimination in an enforcement proceeding against the attorney.*

STATEMENT OF THE CASE

On January 3, 1973, the taxpayer, Dr. Edward J. Mason, was visited at his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that his tax returns for the years 1969, 1970, and 1971 were under investigation. (R. 59-60)[1] The agents advised Dr. Mason of his constitutional rights, including his right not to incriminate

* In the Fifth Circuit, Respondents also urged a Fourth and Fifth Amendment claim not recognized by the Government in its Petition. They argued that to make the predictable transfer of records from a taxpayer to his attorney the occasion for the loss of Fifth Amendment rights would render the Internal Revenue Service's own Miranda warning deceptive and would violate the taxpayer's Fourth Amendment right against unreasonable search and seizure since the use of fraud, deceit or trickery in gaining access to incriminating evidence makes an otherwise lawful search unreasonable and unconstitutional. See I.R.S. News Release IR-949 (1969), CCH Fed. Tax Rptr. ¶6946. Cf. *Gould v. United States*, 255 U.S. 298 (1921); *United States v. Tarlowski*, 305 F.Supp. 112, 124 (E.D. N.Y. 1969). The Fifth Circuit did not rely on this ground for its decision. However, this Fourth and Fifth Amendment claim further supports the decision below and will be urged by the Respondents in the event that a Writ of Certiorari is granted.

[1] "R." references are to the separately bound appendix filed in the Court of Appeals.

himself and his right to counsel (R. 60, 70-71), and informed Dr. Mason that one of the functions of a Special Agent was to investigate the possibility of criminal violations of the Internal Revenue laws and that anything Dr. Mason said or submitted to them might be used against him in a criminal proceeding (R. 71).

During the course of the ensuing conversation, Special Agent Mabrey asked to see Dr. Mason's personal books and records. Dr. Mason then placed certain records on his desk; records which are not involved in this case, which the Government admits are privileged and which the Government does not seek (R. 123-124). In response to Mabrey's request, however, Dr. Mason placed a call to his accountant, Jerry Candy, one of the Respondents herein (R. 61, 83), in order to obtain tax records then in the possession of Tannebaum, Bindler & Lewis, the accounting firm where Mr. Candy was employed (R 79-80) and which had handled the preparation of Dr. Mason's tax returns for the years in question (R. 81). However, when Mr. Candy learned that Dr. Mason was visiting with two Special Agents, he advised Dr. Mason not to show any of his records to the Special Agents (R. 61, 83-84), and Dr. Mason withdrew the records on his desk and concluded the interview (R. 63-64).

Following Dr. Mason's call to Mr. Candy, Candy called Cyril Kasmir, the other Respondent herein, a duly licensed attorney (R. 103), and informed him of the Special Agents' visit to Dr. Mason's office (R. 83, 97-98). At Candy's request, Mr. Kasmir called Dr. Mason and was retained by the taxpayers that same afternoon (R. 100).

Early the next morning, at the direction of his employer, Tannebaum, Bindler & Lewis, Mr. Candy delivered a quantity of files and records to Dr. Mason (R. 98). Dr. Mason received the files and records, gave Mr. Candy a receipt for them (R. 98-99) (Exhibit 6, Ex. Vol. at 9), and after about five to ten minutes of deliberations, Dr. Mason placed the records in the custody of his attorney, Mr. Kasmir (R. 88, 99).

The following day, January 5, 1973, summonses were served on Mr. Candy and Mr. Kasmir, ordering them to appear before Special Agent Mabrey on January 15, 1973, and then and there to give testimony and to produce for examination the following records of Tannebaum, Bindler & Lewis:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of Dr. E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler and Lewis and Dr. E. J. Mason during 1969, 1970, and 1971 (R. 8-11).

Candy and Kasmir appeared on January 15, 1973, as directed, but refused to testify or to turn over any records to the Special Agents. Mr. Candy left a prepared statement with the Special Agents stating, in substance, that prior to the time he was served with the summons he had delivered the records described to Dr. Mason. He also refused to answer any questions on the grounds of the attorney-client privilege relating to any assistance he was providing Mr. Kasmir who had retained him to assist in analyzing the books and records of Dr. and Mrs. Mason regarding any potential tax liability for the years 1969, 1970, and 1971 (R. 25).

Mr. Kasmir also left a written statement with the Special Agents. He stated that he had been retained by Dr. and Mrs. Mason to represent them with respect to their income tax liability for the years 1969, 1970, and 1971, in connection with the audit of their income tax returns and the examination being conducted by the Internal Revenue Service. He declined to testify on the grounds of the attorney-client privilege and declined to produce records on behalf of his clients based upon the Fourth Amendment's protection against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination (R. 26).

On or about March 21, 1973, the United States Attorney filed a Petition to Enforce the Internal Revenue Summons pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7402(b) and §7604(a), and an Order To Show Cause issued on March 21, 1973, setting a hearing on the Government's Petition for March 28, 1973 (R. 1, 12). Respondents herein filed a sworn Response to the Order To Show Cause and a Motion To Quash Summons (R. 13) in which Mr. Candy stated, *inter alia,* that on January 4, 1973, prior to the receipt of the summons, he had delivered documents and files to Dr. Mason at the direction of his employer, Samuel H. Tannebaum, and relinquished to the taxpayer, Dr. Mason, the rightful, indefinite and legitimate possession of such documents and files (R. 17, 18). Attorney Kasmir stated in the Response, also under oath, that he had possession of certain documents and files delivered to him by Dr. Mason on January 4, 1973, and that his clients, Dr. and Mrs. Edward Mason, had specifically directed him to assert

on their behalf their rights under the Fourth and Fifth Amendments (R. 19-20). He declined to produce the documents covered by the summons on the grounds that the Government's attempt to obtain production amounted to an unreasonable search and seizure and that evidence contained in the documents would tend to incriminate the taxpayers and might be used as evidence against them in criminal proceedings for violation of the Internal Revenue laws (R. 19-22).

A hearing on the Petition and Response was held on March 28, 1973, as scheduled, and the Court entered an Order finding that the records belonged to the accounting firm of Tannebaum, Bindler & Lewis; finding that they were in the possession of C. D. Kasmir; ordering Mr. Kasmir to appear before Special Agent Mabrey and there to produce for inspection all of the accountant's work papers, reports, tax returns, and documents described in the summons; and further ordering Respondent Candy to appear before Special Agent Mabrey and to testify with respect to the accountant's records.[2] (R. 132-133). The Order was stayed pending appeal to the United States Court of Appeals for the Fifth Circuit (R. 134).

The Fifth Circuit reversed the Order of the District Court insofar as it had enforced the summons against Mr. Kasmir for production of the records, and affirmed the District Court's

[2] It is important to note that the District Court's Order enforcing the Internal Revenue Summons (R. 132) did *not* require Respondent Candy to produce documents and did *not* require Respondent Kasmir to testify. Moreover, the Government explicitly stated in the District Court that the testimony sought from Mr. Candy is "explanatory testimony on the records, that is all. We are asking Candy nothing about anything that might have happened since his relationship in the instant case with Kasmir was convened; we don't want to know that." (R. 11).

order with respect to Mr. Candy.[3] Thereafter, the Government filed its Petition for a Writ of Certiorari with this Court seeking review of the decision of the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE IN THIS CASE IS NEITHER CONTROVERSIAL NOR DOES IT REPRESENT A THREAT TO THE CONDUCT OF TAX INVESTIGATIONS.

The Government argues that to defeat an Internal Revenue summons under circumstances where the taxpayer "serves as a conduit for the transfer of the accountant's workpapers to the custody of the taxpayer's attorney" presents an issue "of major importance to the conduct of federal tax investigations" (Pet. at 7-8). Respondents not only take issue with the Government's characterization of this question, they respectfully submit that the questions presented by this case are not of major importance to the conduct of federal tax investigations.

[3] Due to the limited nature of the District Court's Order with respect to Mr. Candy, and *in express reliance* on the representations made by counsel for the Government, no challenge was made in the Court of Appeals to the validity of the District Court's Order with respect to Mr. Candy. His appeal was simply a protective appeal in order to insure that the Government did not change its interpretation of the District Court's Order by attempting to inquire into matters which Mr. Candy might have learned in the course of his employment by Mr. Kasmir in the instant case, which matters would be protected under the attorney-client privilege. See *United States v. Judson*, 322 F. 2d 460, 462 (9th Cir. 1963). Thus, Mr. Candy's appeal was not absolutely necessary to the disposition of the main issue in the Fifth Circuit which related to that portion of the District Court's Order directing Mr. Kasmir to produce the records in question.

A. The Government Erroneously Characterizes the Issue in this Case.

The Government's characterization of the issue in this case implies that the taxpayers somehow acted improperly by transferring the papers to their attorney and that by such transfer they attempted to improve their legal position. However, as the Fifth Circuit correctly perceived, the issue is not whether the taxpayers could have rightfully claimed the privilege had they retained the records themselves, for that was never put in issue[4] and was effectively conceded below.[5] See *United States v. Cohen,* 388 F. 2d 464 (9th Cir. 1967). Rather the thrust of the Government's argument is that the transfer of records from the taxpayers to their attorney effectively *decreased* the taxpayers' rights. As the Fifth Circuit stated:

> "If we hold that no Fifth Amendment privilege is now available, then the taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney."

499 F. 2d at 451.

Thus, the Government's position in this case is the same as it was more than ten years ago in *United States v. Judson,* 322 F. 2d 460 (9th Cir. 1963). As the Court there stated:

> "The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less.
>
> * * *
>
> "The government has at its disposal inquisitorial powers

[4] 499 F. 2d at 452.

[5] R. 123. See also, *United States v. Judson,* 322 F. 2d 460, 466 (9th Cir. 1963) where a similar concession was made.

> and administrative procedures which it may invoke at its pleasure. If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer were not available to utter the magic words. In our judgment, the inherent power thus to compel indirectly an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly."

322 F. 2d at 466 and 468.

The undisputed facts of this case are that the Government advised the taxpayers of their right to counsel; that the taxpayers exercised that right by retaining counsel; that counsel, in order to effectively advise his clients, *predictably* took possession of the records from the taxpayers; and that all of this occurred prior to the time that any summons was served by the Government. Since this Court has held that "[t]he rights and obligations of the parties became fixed when the summons was served . . .,"[6] the Fifth Circuit correctly held that the taxpayers' actions taken prior to the issuance of the summons were "wholly proper." 499 F. 2d at 451. Moreover, the taxpayers never claimed any enlargement of their rights as a result of the transfer to their attorney. Rather, it is the Government which seeks to gain advantage from the fact that the taxpayers placed the records in the hands of their counsel. All the taxpayers sought was legal advice, including advice as to their constitutional rights. If the transfer of records to the taxpayers' attorney were held to result in the loss of the privilege against self-incrimination, nothing would be ac-

[6] *Couch v. United States,* 409 U.S. 322, 328, n. 9 (1973).

complished but the placing of an unnecessary and unconstitutional burden on the exercise of the privilege that would effectively force an accused to choose between the right to counsel on the one hand and the privilege against self-incrimination on the other. There is no sound reason to impose such a Hobson's choice on the accused. As the Fifth Circuit correctly stated:

> " . . . we . . . reject the idea that a taxpayer's right to be free from self-incrimination can be *decreased* or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship." (Emphasis in original).

499 F. 2d at 452.

The real issue in this case is whether possession of records by the taxpayer's attorney previously in the actual possession of the taxpayer constituted sufficient constructive possession by the taxpayer to support his assertion of the privilege against self-incrimination. We submit that the law has long permitted assertion of the privilege in these circumstances.[6A]

The Government's misplaced reliance on dicta from *Matter of Harris*, 221 U.S. 274, 279-280 (1911) cannot change this result. *Matter of Harris, supra,* was a case in which an involuntary bankrupt was required to turn over his records to a receiver, despite a claim of self-incrimination. However, as this Court explained in *McCarthy v. Arndstein*, 266 U.S. 34, 41 (1924), *Matter of Harris* rests on the proposition that the privilege

[6A] *United States v. Judson*, supra; *Colton v. United States*, 306 F. 2d 633, 639 (2d Cir. 1962), *cert den.*, 371 U.S. 951 (1963); *Hughes v. Foster, Lewis, Langley & Onion*, ... F. Supp. ....., 65-1 U.S.T.C., ¶9418 (W.D. Tex. 1965); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956); *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917). See 8 Wigmore, *Evidence* (McNaughton Rev. 1961), §2307, pp. 593-595.

against self-incrimination relates to the "adjective law," i.e., to evidence and witnesses, and therefore the privilege does not prevent the true owner of property from obtaining its return. Since the bankruptcy petition in *Matter of Harris* operated to vest the receiver with title to the papers in question, the privilege, which is testimonial in nature, was not allowed to defeat the receiver's superior right of ownership. In this case, on the other hand, the Government's claim to the papers rests not on any claim to superior title, but solely on the adjectival claim to view the records for their evidentiary and testimonial content. *Matter of Harris* is, therefore, wholly inapplicable to this case. See *McCarthy v. Arndstein, supra,* 266 U.S. at 41. There is no doubt that in the circumstances of this case, the purpose of the Fifth Amendment privilege to prevent testimonial compulsion is directly implicated. See *Boyd* v. *United States,* 116 U.S. 616 (1886).

B. This Case Presents No Issue of Any Real Importance To The Conduct of Federal Tax Investigations and is Not Likely to Recur with Any Frequency.

We also reject the Government's thesis that this case presents an issue of "major importance to the conduct of federal tax investigations" (Pet. at 7-8). The fact situation in this case occurred only as the result of the Government's own actions and need never occur again in order for the tax laws to be effectively enforced. As shown by this Court's decision in *Couch* v. *United States,* 409 U.S. 322 (1973), there is no reason why the Government cannot initially proceed to summon accountant's workpapers directly from the accountant himself without first alerting the taxpayer to the fact that he is under criminal investigation. The Government has in its

possession the taxpayer's income tax returns. The accountants who prepare the returns are required by law to verify them, Reg. §1.6065-1(b) (1), by placing their signatures and addresses on the tax return. See Form 1040. If the Government had initially obtained the identity of the accountant from its copies of the taxpayer's return, and issued the summons to the accountant rather than first advising the taxpayer of the criminal tax investigation and attempting to obtain incriminating statements from the taxpayer, no issue with respect to the accountant's workpapers would ever have arisen. See *Couch* v. *United States, supra.* Thus, to say that this case presents an issue of "major importance to the conduct of federal tax investigations" is to greatly exaggerate its importance. This case presents no new or novel issues. See *United States v. Judson, supra.* Nor does it frustrate the Government's ability to obtain accountant's workpapers when proper procedures are followed. See *Couch v. United States, supra.* It simply presents a fact situation where, due to the Government's election to advertise in advance its intentions to the taxpayers, it has failed in its efforts to enforce part of the summons. Unless it can be said that every successful assertion of Fifth Amendment rights requires action by the Supreme Court, vindication of the Government's tactical decisions in this case does not warrant Supreme Court intervention.

II.

NO DIRECT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS IS PRESENTED BY THIS CASE.

The Government also argues that "the decision below

squarely conflicts with that of another Court of Appeals" (Pet. at 8), citing *United States v. Fisher,* 500 F. 2d 683 (3d Cir. 1974), and that this Court should grant a Writ of Certiorari to resolve that conflict. Unfortunately, the Government does not tell us wherein the conflict lies other than the fact that in one case the summons was enforced and in the other it was not. While it is true that the two cases have points of similarity, there are also major dissimilarities between them, specifically on the issues of "rightful possession" and "standing," which clearly distinguish the two cases and which permit them to be resolved on entirely different grounds. Since, as more fully explained below, the cases are susceptible of resolution without ever reaching the points of alleged conflict, the alleged conflict is not a sufficient reason for granting review. See Stern, *Denial of Certiorari Despite A Conflict,* 66 Harv. L. Rev. 465, 471 (1953).

A. The Cases Are Distinguishable on the Issue of Rightful Possession.

In *Couch v. United States, supra,* this Court reserved judgment on the issue of "what qualifies as rightful possession." 409 U.S. at 332, n. 12. A rightful possession issue arises where the true owner makes a demand on the taxpayer for the return of the papers in question. See *United States v. Cohen,* 388 F. 2d 464, 465, 468 (9th Cir. 1967); *Deck v. United States,* 339 F. 2d 739, 740 (D.C. Cir. 1964), *cert. den.,* 379 U.S. 967 (1965); *United States v. Riland,* 364 F. Supp. 120 (S.D. N.Y. 1973); *In re Grant,* 198 F. 708, 709 (S.D. N.Y. 1912), *aff'd 227* U.S. 74 (1913). While a rightful possession issue exists in *Fisher,* see 500 F. 2d at 685 and 696-

697 (dissenting opinion), no such issue exists in this case since the firm of Tannebaum, Bindler & Lewis *never* made a demand for the return of its papers. Moreover, its employee, Jerry Candy, acting at the direction of his employer, Samuel H. Tannebaum, has stated in a sworn answer that in delivering the documents in question, he relinquished to the taxpayers "the rightful, indefinite and legitimate possession" of such documents (R. 17, 18). Neither the District Court nor the Court of Appeals considered this case to involve an issue of "rightful possession," and the issue was not presented by the Government to either Court below.

In *Fisher*, on the other hand, a demand for the return of the papers in question was made by the accountant to the taxpayer, and the dissenting judge urged that the case be remanded to the District Court for further findings on this issue. Since the issue of rightful possession is not present in this case, should this Court decide to review *Fisher* in order to resolve the rightful possession issue, there is no need to review this case as well. Moreover, if this Court decides to deny review in both this case and *Fisher*, the cases will still be distinguishable on the issue of rightful possession. Finally, this Court should not grant review in both cases on the grounds of an alleged conflict, since the resolution of the rightful possession issue could easily cause any seeming conflict between the cases to disappear in the course of appellate review.

B. The Cases Are Distinguishable On The Issue of Standing.

The Government has raised a standing issue in this case which is not raised in the *Fisher* case "because the taxpayers

there intervened in the district court to assert the privilege for themselves." (Pet. at 12). However, the Government has overlooked the possibility that *Fisher* can be affirmed on the rightful possession issue, and that such affirmance would not necessitate reversal of this case. The Government has also overlooked the fact that if this case were reversed on the issue of standing, no points of conflict with *Fisher would ever be reached.*

Finally, the Government argues that even if *Fisher* is reversed, the Court should still review this case on the issue of standing. Respondents submit that the standing issue is not in and of itself of sufficient importance to warrant this Court's attention.

III.

THE STANDING QUESTION DOES NOT MERIT CONSIDERATION BY THIS COURT.

A. The Courts of Appeals Have Adequately Resolved the Standing Question.

The Government argues that this case conflicts with *Bouschor v. United States,* 316 F. 2d 451 (8th Cir. 1963) on the issue of standing, and that Supreme Court review should also be granted to consider this issue. Respondents submit that the reasons for such review are extremely weak.

To begin with, *Bouschor v. United States,* 316 F. 2d 451 (8th Cir. 1963), on which the Government relies, reflects a

clear minority position among the circuits,[7] and the alleged conflict on which review is so urgently sought has been outstanding for more than a decade with no discernible adverse consequences. More importantly, however, *Bouschor* is based on a clear misreading of Supreme Court cases and has seldom been followed. As pointed out by Judge Ainsworth in *United States v. White*, 477 F. 2d 757, 766, n. 4 (5th Cir. 1973) (dissenting opinion), *aff'd per curiam en banc*, 487 F. 2d 1335, *cert. den.*, October 15, 1974, *Bouschor* relied

> ". . . on dicta from Supreme Court cases where a mere agency relationship existed for the benefit of a public entity which had no Fifth Amendment privilege, such as in Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951); United States v. White, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S. Ct. 385, 50 L. Ed 671 (1906); and Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906)."

These cases are clearly inapplicable to a claim of privilege made on behalf of an individual.[8] Furthermore, the *Bouschor* decision entirely fails to consider that an attorney, unlike

[7] See *United States v. Judson*, 322 F. 2d 460, 463-465 (9th Cir. 1963); *Colton v. United States*, 306 F. 2d 633, 639 (2d Cir. 1962), *cert. den.*, 371 U.S. 951 (1963); *Brody v. United States*, 243 F. 2d 378, 387, n. 5 (1st Cir. 1957), *cert. den.*, 354 U.S. 923 (1957). See also, *United States v. Riland*, 364 F. Supp. 120, 121-122 (S.D. N.Y. 1973); and 8 *Wigmore*, Evidence, § 2307.

[8] See Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. Miami L. Rev. 854, 864 (1967):

> "Hence, the attorney should be able to assert the Fifth Amendment privilege against self-incrimination for and on behalf of his taxpayer-client at any time the privilege exists and could be raised by the taxpayer personally. *Such a rule would not seem to contravene any decision of the Supreme Court for it appears that its use of the term 'personal privilege' has specific reference to the fact that no individual can assert it on behalf of an organization to which the privilege is inapplicable.* This is borne out by such statements that '[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.' Thus, the concept of the privilege being a personal one should not prevent the attorney from raising it." (Emphasis added)

other agents, is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and his assertion of the privilege is tantamount to the client's appearance and assertion of the privilege. This is clearly the law with respect to the assertion of the attorney-client privilege which is also a "personal privilege."[9] Respondents have discovered no sound reason for distinguishing between the attorney-client privilege and the privilege against self-incrimination with respect to the attorney's standing to assert them on behalf of his client.

B. The Position Urged By The Government is Not in Accord with Decisions of This Court and is Wasteful of Limited Judicial Resources.

The Government states in its Petition that the privilege against self-incrimination, "like other privileges, may freely be waived by the person entitled to claim it" (Pet. at 11), thereby suggesting that the taxpayers' failure to intervene constituted a waiver of the privilege. This is clearly not the case. As pointed out by this Court in *Donaldson v. United States*, 400 U.S. 517, 531 (1971), an adverse ruling on the standing issue

f.n. 8 (Cont'd)

> *vidual can assert it on behalf of an organization to which the privilege is inapplicable.* This is borne out by such statements that '[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals.' Thus, the concept of the privilege being a personal one should not prevent the attorney from raising it." (Emphasis added)

[9] *Schwimmer v. United States*, 232 F. 2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *Ex parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sup. Ct. 1922). As said by the Court in *Ex parte Lipscomb, supra:*

> "Where the attorney objects to testifying upon the ground of privilege, it is to be regarded as the objection of the client."

See also, 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961).

in no way precludes the taxpayer from raising his privilege in any criminal proceeding that may eventually be brought against him. See also *United States v. Newman,* 441 F. 2d 165, 174 (5th Cir. 1971). Thus, the position urged by the Government is simply wasteful of limited judicial resources to no good purpose. Insistence on such a standing rule simply postpones until trial the day of reckoning when the privilege *can* be asserted. Such a postponement is unnecessarily costly to all concerned, for if the claim of privilege is valid now, it will be valid then and postponing the day for determination of that issue only means that the Government's intervening investigation and expenditure of public funds is likely to be wasted since any evidence the Government gathers resulting from the enforcement of the summons will probably be suppressed at trial as fruit of the poison tree. *Murphy v. Waterfront Commission of New York,* 378 U.S. 52, 79 (1964); *Wong Sun v. United States,* 371 U.S. 471 (1963).[10]

[10]This is not, of course, to say that a motion to suppress at trial is an adequate substitute for the nondisclosure of the records at the outset and the quashing of the summons. It clearly is not. Once the Government has the records, it can use them to develop evidence and follow leads in innumerable ways too subtle to trace and so long as the Government is careful to also develop some plausible "independent source" for the evidence it actually introduces at trial, it can profit from its improper acts. The taxpayer can easily lose in his subsequent efforts to show that the evidence used against him has an illegal source. See *Balistrieri v. United States,* 394 U.S. 985, 89 S. Ct. 1463, 22 L. Ed. 2d 761 (1969). While the suppression procedure is therefore entirely proper where no legal mechanism exists for stopping the disclosures in advance (e.g., where there are covert bugging activities or warrantless arrests), and suppression is the best remedy available under the circumstances, the availability of such a procedure at trial is no excuse for lending the Government the aid of the judiciary to enforce an unconstitutional disclosure in circumstances where the Courts have it within their power to prevent the abuse at the threshold.

C. While This Court Has Never Required Intervention, Its Sanction of the Intervention Procedure Makes it Unlikely That the Standing Issue Will Recur With Any Frequency in the Future.

Subsequent to the decision in *Bouschor,* this Court held that "third parties *might* intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene." (Emphasis added) *Reisman v. Caplin,* 375 U.S. 440, 449 (1964). This Court has never *required* intervention. Thus, the Fifth Circuit was clearly correct when it held:

> "While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure."

499 F. 2d at 454.

Since intervention is now available to taxpayers, it is unlikely that the standing issue will recur in the future with sufficient frequency to justify this Court's review.

D. The Government's Reasons For Requiring Intervention Will Not Withstand Scrutiny.

The Government argues that the taxpayers' presence at the hearing to enforce the summons should be required because "there may be need to determine whether the documents sought are the private papers of the claimant." (Pet. at 11). Respondents submit that this argument is simply an attempt to reimpose some kind of ownership test on the availability of the privilege against self-incrimination, a test which has been clearly rejected by this Court's decision in *Couch v. United States, supra,* 409 U.S. at 331, and 331, n. 12. Moreover, if the Government believed it was necessary to personally interrogate the taxpayers, it could have subpoened them to appear at the hearing. Not

only did the Government fail to exercise its right to have the taxpayers present at the hearing, it did not even raise the issue of standing until final argument, after the close of evidence (R. 112). Nor did the District Court rule on the question. Under these circumstances, we submit that the standing issue has been waived, *and is not properly before this Court.*[11]

E. Since the Standing Issue Is Largely of the Government's Own Making and Within Its Control, It Should Not Be Allowed To Impair The Taxpayer's Substantive Rights.

The standing issue is largely of the Government's own creation and elevates form over substance. It is well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party himself, even though in fact the documents in question may be in the actual possession of his attorney.[12] The physical location of the documents is unim-

[11]The simple fact is that there was nothing the taxpayers could have added to the testimony or Mr. Candy (the accountant), or Mr. Kasmir, or to the documentary evidence (e.g., the receipt) concerning either the question of ownership or possession. We are at a loss to understand what other testimony the Government seeks that would have been relevant to the disposition of this case. Furthermore, the Government's argument that there is a need to show that the papers are "private papers" is legally irrelevant. In *United States v. White*, 322 U.S. 694, 699 (1944), this Court stated that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity.*" (Emphasis added) This concept of "possession in a purely personal capacity" was re-emphasized in *Couch v. United States, supra*, 409 U.S. at 330, n. 10. There was never any question that Dr. Mason received and held the papers in this case "in a purely personal capacity."

[12]*In re Ruppert*, 309 F. 2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware*, 11 F.R.D. 44 (S.D.N.Y. 1951). See also, *Drehle v. Fleming*, 274 N.E. 2d 53 (Ill. Sup. Ct. 1971); *Williams v. Consolidated Investors, Inc.*, 472 P. 2d 248 (Kan. Sup. Ct. 1970); *Unger v. Los Angeles Transit Lines*, 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960).

portant. Basically, the test is control.[13] So long as the attorney is subject to the direction and control of his client, the attorney must produce records in his possession when the client is subpoened.[14] If the Government had served its summons upon the taxpayer in this case once it learned that the papers it sought were in the possession of the taxpayer's attorney, no issue of standing would now exist. In view of the Government's representations to this Court in the *Couch* case that in situations where the taxpayer "retains possession and control of the records, it ordinarily issues the summons to the taxpayer because it is the taxpayer who has the dominion over the records and the authority to return the summons," *Couch v. United States, supra*, 409 U.S. 334, n. 18, we fail to understand what purpose was served by issuance of a summons to the taxpayers' attorney in this case, except to interject into the enforcement proceeding a spurious standing issue that might improve the Government's legal position. Since the real parties in interest were the taxpayers, the summons should have been served upon them rather than upon their attorney. The fact that the Government chose to serve the taxpayers' attorney should not be allowed to impair the constitutional rights of the taxpayers.

IV.

CONCLUSION

The issues in this case have been correctly resolved by the Court below and do not involve fact situations that are likely

[13]*Schwimmer v. United States*, 232 F. 2d 855, 860 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *In re Rivera*, 79 F. Supp. 510 (S.D.N.Y. 1948); *Alma-Schuhfabrik AG v. Rosenthal*, 25 F.R.D. 100 (E.D.N.Y. 1960).

[14]See cases cited at footnote 12. Compare *In re National Public Utility Investing Corporation*, 79 F. 2d 302 (2d Cir. 1935).

to recur with any frequency. The instant decision does not threaten the Government's ability to conduct tax investigations, nor does it present any new or novel questions of law. The issues have been before the Courts of Appeals for some time and the Government's occasional failure to enforce a summons has had no discernible adverse effect on its conduct of tax investigations. Finally, the alleged conflicts are more apparent than real.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD A. COPLEY
ROBERT E. GOODFRIEND
2800 Republic Nat'l. Bank Bldg.
Dallas, Texas 75201

CYRIL D. KASMIR
2300 Main Tower
Dallas, Texas 75202
Attorneys For Respondents

Of Counsel:
AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Of Counsel:
ROSENBERG, KASMIR & WILLINGHAM
2300 Main Tower
Dallas, Texas 75202

CERTIFICATE OF SERVICE

A true copy of the foregoing "Brief of Respondents in Opposition" has been mailed, certified mail, return receipt requested, to the Honorable Robert H. Bork, Solicitor General of the United States, United States Department of Justice, Washington, D. C. 20530, this 6th day of January, 1975.

CYRIL D. KASMIR

Supreme Court, U. S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT E. GOODFRIEND
EDWARD A. COPLEY
2800 Republic Nat'l Bank Bldg.
Dallas, Texas 75201

CYRIL D. KASMIR
2300 Main Tower
Dallas, Texas 75202
Attorneys for Respondents

Of Counsel:
AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Of Counsel:
ROSENBERG, KASMIR & WILLINGHAM
2300 Main Tower
Dallas, Texas 75202

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Questions Presented 2

Statement of the Case 2

Summary of Argument 8

Argument 22

I. Several Of The Issues Raised By The Government In Its Brief Are Not Properly Before This Court For Review Because They Were Not Presented To Or Decided By The Courts Below, Were Not Set Forth Or Fairly Comprised Within The Questions Presented In The Petition For Writ Of Certiorari, And Were Not Presented In A Brief That Was Timely Filed Under This Court's Own Rules 22

II. The Papers Involved In This Case Are Neither The Papers Of A Collective Entity Nor Are They Held By The Taxpayers In A Representative Capacity 29

A. The Essential Character Of Papers As Organizational Papers Is Not Determined By Their Ownership, Authorship Or Prior Custodial History 31

B. The Accountant's Workpapers Are Held By The Taxpayers In This Case In A Purely Personal Capacity, Not In A Representative Capacity, And The Collective Entity Cases Are Therefore Inapplicable 42

Page

C. Where The Accused Has A Significant Personal Interest In The Records In Question, That Interest May Not Be Subordinated To Or Disregarded In Favor Of The Governmental Interest In Regulating Collective Entities Without Seriously Impairing The Fundamental Values Protected By The Fifth Amendment 46

III. Accountant's Workpapers Do Not Become Public Or Quasi-Public In Nature Simply Because Portions Of Their Contents May Have Previously Been Disclosed In The Taxpayers' Income Tax Returns 49

IV. The Taxpayers' Fifth Amendment Privilege In The Accountant's Workpapers Was Not Lost By Transferring The Workpapers To Taxpayers' Attorney 62

V. The Accountant's Workpapers Are Testimonial In Nature And Their Compelled Production Would Incriminate The Taxpayers 69

VI. Taxpayers' Attorney Has Standing To Raise Taxpayers' Constitutional Rights 80

Conclusion 91

Appendix A-1

Cases Page

Alma-Schuhfabrik AG v. Rosenthal, 25 F.R.D. 100 (E.D. N.Y. 1960) 88

Application of House, 144 F.Supp. 95 (N.D.Cal. 1956) .. 69, 80

Backer v. C.I.R., 275 F.2d 141 (5th Cir. 1960) 16, 66

Balistrieri v. United States, 394 U.S. 985 (1969) 86

Ballman v. Fagin, 200 U.S. 186 (1906) 57

Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U.S. 612 (1911) 29, 33

Bellis v. United States, 417 U.S. 85 (1974) ..... *passim*

Bertrand v. Mutual Motor Co., 38 S.W.2d 417 (Tex. Civ. App.—Eastland, 1931) 46

Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D. N.Y. 1951) 20, 88

Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) 18, 81, 82, 84

Boyd v. United States, 116 U.S. 616 (1886) 47, 48, 49, 50, 51, 72

Brody v. United States, 243 F.2d 378, 387, n. 5 (1st Cir. 1957), cert. den., 354 U.S. 923 (1957) 80

Chambliss v. State, 231 P.2d 711, 713 (Okla. 1951) 48

Clifton v. Granger, 53 N.W. 316 (Iowa 1892) 80

Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. den., 371 U.S. 951 (1963) 69, 80

Couch v. United States, 409 U.S. 322 (1973) ..... *passim*

Counselman v. Hitchcock, 142 U.S. 547 (1892) 77

Curcio v. Uinted States, 354 U.S. 118, 121 (1957) 17, 29, 63, 71

Davis v. United States, 328 U.S. 582 (1946) 13, 52

Donaldson v. United States, 400 U.S. 517 (1971) 20, 85

Cases	Page
Drehle v. Fleming, 274 N.E.2d 53 (Ill. Sp. Ct. 1971)	88
Dunigan v. United States, 274 U.S. 195 (1927)	8, 24
English v. Dhane, 294 S.W.2d 709 (Tex. 1956)	11, 45
Essgee v. United States, 262 U.S. 151 (1923)	29
Ex Parte Lipscomb, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922)	19, 82
Ex Parte Wilson, 47 S.W. 996 (Tex. 1898)	48
Frost Trucking Co. v. Railroad Comm'n. of State of California, 271 U.S. 583 (1926)	67
Gardner v. Broderick, 392 U.S. 273 (1968)	16, 60, 67
Gathright v. Carl Markley Motor Co., 146 S.W.2d 307, 311 (Tex. Civ. App.—Beaumont, 1940, no writ)	11, 46
Gouled v. United States, 255 U.S. 298 (1921)	17, 72
Grant v. United States, 227 U.S. 74, 80 (1913)	34
Hale v. Henkel, 201 U.S. 43 (1906)	18
Harris, Matter of, 221 U.S. 274, 279-280 (1911)	60, 61
Hill v. Campbell and Wife, Law Rep. 10 C.P. 222 (1875)	56
Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), cert. den., 404 U.S. 991 (1971)	56, 72
Hoffman v. United States, 341 U.S. 479 (1951)	21, 89
Hughes v. Foster, Lewis, Langley & Onion, 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964), govt's appeal dismissed, December 16, 1965.	69, 80
In re Fahey, 300 F.2d 383 (6th Cir. 1961)	81, 82, 84
In re National Public Utility Investing Corporation, 79 F.2d 302 (2d Cir. 1935)	88
In re Rivera, 79 F.Supp. 510 (S.D. N.Y. 1948)	88

Cases	Page
In re Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322 U.S. 753 (1944)	91
In re Ruppert, 309 F.2d 97, 98 (6th Cir. 1962)	20, 88
Irvine v. California, 347 U.S. 128, 129 (1954)	8, 28
Johnson v. Zerbst, 304 U.S. 458 (1938)	60
Laird v. Air Carrier Engine Service, 263 F.2d 948 (5th Cir. 1959)	19, 86, 87
Lawn v. United States, 355 U.S. 339, 362, n. 16 (1958)	8, 24, 25, 28
McCarthy v. Arndstein, 266 U.S. 34, 41 (1924)	60, 61
Maness v. Meyers, 43 U.S.L.W. 4143 (Jan. 15, 1975)	15, 16, 17, 20, 66, 79, 85
Mazer v. Stein, 347 U.S. 201, 208 (1954)	27
Miranda v. Arizona, 384 U.S. 436 (1966)	60, 66
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)	58, 85
People v. Minkowitz, 220 N.Y. 399, 115 N.E. 987 (1917)	65, 69
People v. Myers, 35 Ill.2d 311, 220 N.E.2d 297, 310 (1966)	33, 80
Reisman v. Caplin, 375 U.S. 440, 449 (1964)	21, 90
Remmer v. United States, 205 F.2d 277, 285 (9th Cir. 1953), reversed on other grounds, 347 U.S. 827 (1954)	65
Rogers v. United States, 340 U.S. 367 (1951)	29
Russell v. United States, 369 U.S. 749, 754, n. 7 (1962)	24
Schmerber v. California, 384 U.S. 757 (1966)	16, 17, 23, 69, 70, 74, 75, 77
Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956), cert. den., 352 U.S. 833 (1956)	19, 73, 82, 88

Cases — Page

Simmons v. United States, 390 U.S. 377 (1968) 84

Spevak v. Klein, 385 U.S. 511 (1967) 16, 66, 67

State v. Kirchess, 269 So.2d 16 (Fla.Ct.App.) 78

Stevens v. Marks, 383 U.S. 234, 243-244 (1966) 60, 67

Stuart v. United States, 416 F.2d 459, 463 (5th Cir. 1969) 85

Travelers Health Assn. v. Virginia, 339 U.S. 643, 651, n. 4 (1950) 24

Tyrrell v. District of Columbia, 243 U.S. 1 (1916) 24

Unger v. Los Angeles Transit Lines, 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960) 88

Uniform Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968) 67

United Brotherhood, C & J v. United States, 330 U.S. 395, 412 (1947) 25

United States v. Blank, 459 F.2d 383 (6th Cir. 1972) 72

United States v. Boccuto, 175 F.Supp. 886 (D.N.Y. 1959), appeal dismissed, 274 F.2d 860 80

United States v. James L. Cobb, Jr., 75-2 CCH Tax Rptr. §9534 (6th Cir. 1975) 38

United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) 13, 43, 52, 53, 54, 55, 62

United States v. DeCastro, West & Chodorow, Inc., 75-2 CCH Fed. Tax Rptr §9535 (6th Cir. 1975) 60

United States v. Dionisio, 410 U.S. 1 (1973) 16, 17, 23, 70, 72

United States v. Estate of Donnelly, 397 U.S. 286, n. 5 (1970) 8, 24

United States v. Fisher, 500 F.2d 683 (3rd Cir. 1974), cert. granted, 43 U.S.L.W. 3412 (Jan. 27, 1975) (No. 74-18) 7, 45, 51

Cases — Page

United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964), cert. den., 377 U.S. 976 (1964) 81

United States v. Grunewald, 233 F.2d 556, 581 (2d Cir. 1956), reversed, 353 U.S. 391 (1957) 58

United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) .. 16, 66

United States v. Hoth, 207 F.2d 386, 389 (9th Cir. 1953) .. 24

United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 15, 16, 18, 64, 65, 67, 68, 69, 80, 81, 83, 84

United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), cert. granted, 43 U.S.L.W. 3412 (Jan. 27, 1975) (No. 74-611) 18, 21, 65, 80, 89, 90

United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) 64

United States v. Mara, 410 U.S. 19 (1973) 16, 23, 70

United States v. Newman, 441 F.2d 165, 174 (5th Cir. 1971) 85

United States v. Nobles, 43 U.S.L.W. 4815, 4817, n. 4, 4818 (June 23, 1975) 17, 24, 41, 75, 76

United States v. Riland, 364 F.Supp. 120, 121-122 (S.D. N.Y. 1973) 69

United States v. White, 322 U.S. 694 (1944) 10, 29, 35, 36, 37, 39, 42, 70, 71, 89

United States v. White, 477 F.2d 757 (5th Cir. 1973), aff'd. per curiam en banc, 487 F.2d 1335, cert. den., 419 U.S. 872 (1974) 18, 81

United States Corp. v. Guillory, 206 F.2d 49 (5th Cir. 1953) 91

Van Brunt & Davis Co. v. Harrigan, 8 S.D. 96, 98, 65 N.W. 421, 422 (1895) 46

Warden v. Hayden, 387 U.S. 297 (1967) 70

Wheeler v. United States, 226 U.S. 478(1913) 29, 33

Cases Page

Williams v. Consolidated Investors, Inc., 472 P.2d 248 (Kan. Sp. Ct. 1970) 88

Wilson v. United States, 221 U.S. 361 (1911) 9, 13, 23, 29, 31, 32, 33, 34, 50, 78

Wong Sun v. United States, 371 U.S. 471 (1963) 85

Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949), cert. den., 338 U.S. 822 (1949) 81

Constitution and Statutes

United States Constitution:
Fifth Amendment ..... *passim*

Miscellaneous

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 7402(b) 2, 5
Sec. 7602 2
Sec. 7604(a) 2, 5

ABA Code of Professional Responsibility, Ethical Consideration 4-4 64

2A C.J.S., Agency, §8, pp. 563-564 45

8 C.J.S., Bailments, §520, p. 368 44

Federal Rules of Civil Procedure, Rule 1 91

IRS News Release IR-949 (1969), CCH Fed Tax Rptr. §6946 ..... 16, 66

Supreme Court Rules:
Rule 23(1)(c) 7, 25
Rule 40(d)(2) 8, 27

Texas Code of Criminal Procedure, §38.10 64

8 Wigmore, Evidence (McNaughton Rev. 1961)
Sec. 2259b 32
Sec. 2270 80
Sec. 2291 83
Sec. 2307 69
Sec. 2321 ..... 19, 82

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Order of the District Court (Pet. App. A 1A) is not reported. There is no written opinion of the District Court. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B 2A-23A) is reported at 499 F.2d 444.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C 24A) was entered on August 21, 1974. The Petition for a Writ of

Certiorari was filed on November 18, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution. Sections 7402(b), 7602, and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

2. If the client's privilege against self-incrimination is available as a bar to production of his accountant's workpapers in these circumstances, whether the claimant's attorney can properly invoke his client's privilege.

STATEMENT OF THE CASE

On January 3, 1973, the Taxpayer, Dr. Edward J. Mason, was visited at his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that the tax returns for he and his wife, Rae Mason, for the years 1969, 1970, and 1971 were under investigation

(A. 38-39). The Special Agents advised Dr. Mason of his constitutional rights, including his right not to incriminate himself and his right to counsel (A. 39, 45). They informed Dr. Mason that one of the functions of a Special Agent was to investigate the possibility of criminal violations of the Internal Revenue laws and that anything Dr. Mason said or submitted to them might be used against him in a criminal proceeding (A. 45).

During the course of the ensuing conversation, Special Agent Mabrey asked to see Dr. Mason's personal books and records. Dr. Mason then placed certain records on his desk; records which are not involved in this case, which the Government admits are privileged and which the Government does not seek (A. 75-76). When the possibility was raised that some of the records for the years in question were missing, Dr. Mason placed a call to his accountant, Jerry Candy, one of the Respondents herein (A. 39, 52), in order to obtain tax records then in the possession of Tannebaum, Bindler & Lewis, the accounting firm where Mr. Candy was employed and which had handled the preparation of Dr. Mason's tax returns for the years in question (A. 50-51). When Mr. Candy learned that Dr. Mason was visiting with two Special Agents, he advised Dr. Mason not to show any of his records to the Special Agents (A. 39, 53), and Dr. Mason withdrew the records on his desk and concluded the interview (A. 40-41).

Following Dr. Mason's call to Mr. Candy, Mr. Candy called Cyril Kasmir, the other Respondent herein, a duly licensed attorney (A. 64), and informed him of the Special Agents' visit to Dr. Mason's office (A. 52, 60-61). At Mr. Candy's

request, Mr. Kasmir called Dr. Mason and was retained by the Taxpayers that same afternoon (A. 62).

Early the next morning, at the direction of his employer, Tannebaum, Bindler & Lewis, Mr. Candy delivered a quantity of files and records to Dr. Mason (A. 61). Dr. Mason received the files and records, gave Mr. Candy a receipt for them (A. 61 and Exhibit 6 at A. 89), and after about five to ten minutes of deliberations, Dr. Mason placed the records in the custody of his attorney, Mr. Kasmir (A. 55, 61).

On the following day, January 5, 1973, summonses were served on Mr. Candy and Mr. Kasmir ordering them to appear before Special Agent Mabrey on January 15, 1973, and then and there to give testimony and to produce for examination the following records of Tannebaum, Bindler & Lewis:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of Dr. E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971 (A. 9-12).

Mr. Candy and Mr. Kasmir appeared on January 15, 1973, as directed, but refused to testify or to turn over any records to the Special Agents. Mr. Candy left a prepared statement with the Special Agents stating, in substance, that prior to the time he was served with the summons he had delivered the records described to Dr. Mason. He also refused to answer any questions on the grounds of the attorney-client privilege relating to any assistance he was providing Mr. Kasmir,

who had retained him to assist in analyzing the books and records of Dr. and Mrs. Mason regarding any potential tax liability for the years 1969, 1970, and 1971 (A. 22).

Mr. Kasmir also left a written statement with the Special Agents. He stated that he had been retained by Dr. and Mrs. Mason to represent them with respect to their income tax liability for the years 1969, 1970, and 1971, in connection with the audit of their income tax returns and the examination being conducted by the Internal Revenue Service. He declined to testify on the grounds of the attorney-client privilege and declined to produce the records on behalf of his clients based upon the Fourth Amendment protection against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination (A. 23).

On or about March 21, 1973, the United States Attorney filed a Petition to Enforce Internal Revenue Summons pursuant to Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7402(b) and §7604(a), and an Order to Show Cause issued on March 21, 1973, setting a hearing on the Government's Petition for March 28, 1973 (A. 4, 13). Respondents herein filed a sworn Response to the Order to Show Cause and Motion to Quash Summons (A. 14) in which Mr. Candy stated, *inter alia*, that on January 4, 1973, prior to the receipt of the summons, he had delivered documents and files to Dr. Mason at the direction of his employer, Samuel H. Tannebaum, and relinquished to the Taxpayer, Dr. Mason, the rightful, indefinite and legitimate possession of such documents and files (A. 16, 17). Attorney

Kasmir stated in the Response, also under oath, that he had possession of certain documents and files delivered to him by Dr. Mason on January 4, 1973, and that his clients, Dr. and Mrs. Edward Mason, had specifically directed him to assert, on their behalf, their rights under the Fourth and Fifth Amendments (A. 18-19). He declined to produce the documents covered by the summons on the grounds that the Government's attempt to obtain production amounted to an unreasonable search and seizure and that the evidence contained in the documents would tend to incriminate the Taxpayers and might be used as evidence against them in criminal proceedings for violation of the Internal Revenue laws (A. 17-19).

A hearing on the Petition and Response was held on March 28, 1973, and the Court entered an Order finding that the records belonged to the accounting firm of Tannebaum, Bindler & Lewis; finding that they were in the possession of Mr. Kasmir; ordering Mr. Kasmir to appear before Special Agent Mabrey and there to produce for inspection all of the accountant's workpapers, reports, tax returns, and documents described in the summons; and further ordering Mr. Candy to appear before Special Agent Mabrey and to testify with respect to the accountant's records (A. 93). The Order was stayed pending appeal to the United States Court of Appeals for the Fifth Circuit (A. 94-95).

The Fifth Circuit reversed the Order of the District Court insofar as it had enforced the summons against Mr. Kasmir for production of the records and affirmed the District Court's Order with respect to Mr. Candy for his testimony concerning the sought-after documents. The Government did not seek a

stay of the decision of the Fifth Circuit and the mandate issued on October 7, 1974. The Government then filed its Petition for a Writ of Certiorari with this Court seeking review of the decision of the Fifth Circuit and this Court granted the Petition for a Writ of Certiorari on January 27, 1975. In its Order granting the Petition for a Writ of Certiorari, this Court ordered this case, No. 74-611, consolidated with *Fisher v. United States*, No. 74-18.

Taxpayers note an important limitation on the scope of review in this case. The summons served on Mr. Kasmir and Mr. Candy sought accountant's workpapers, retained copies of the Taxpayers' returns, retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and the Taxpayers (A. 81-84). However, the "Questions Presented" section of the Government's Petition for a Writ of Certiorari (Pet. for Writ at 2), and both the "Questions Presented" section and the text of the Government's Brief for the Petitioners (Pet. Brief at 2) indicate that the Government is seeking a review of the decision of the Fifth Circuit Court of Appeals only with respect to the accountant's workpapers. Since the other items sought by the summons were not included by the Government in the questions presented herein, or in its written argument, we assume that the decision of the Court of Appeals with respect to them will stand and will not be subject to review by this Court pursuant to Rule 23(1)(c) of the Supreme Court Rules. Therefore, following the Government's own Brief, we limit our discussion to the scope of the questions presented and we discuss only the application of the privilege to the accountant's workpapers.

SUMMARY OF ARGUMENT

1. In its Brief on the merits the Government contends that a taxpayer's Fifth Amendment privilege against self-incrimination does not extend to accountant's workpapers in the possession of the taxpayer's attorney because, *inter alia*, the workpapers are the records of a "collective entity," not the private papers of the accused; and because such records are not testimonial or communicative in nature. Taxpayers submit that these arguments are not properly before this Court for review since neither issue was raised or considered in the courts below. See *United States v. Estate of Donnelly*, 397 U.S. 286, n. 5 (1970); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *Dunigan v. United States*, 274 U.S. 195, 200 (1927). There are no exceptional circumstances in this case that would warrant a departure from this rule. *Lawn v. United States, supra.*

Further, neither issue was adequately set forth in the Government's Petition for Writ of Certiorari or fairly comprised within the questions presented in the Petition, as required by Supreme Court Rule 23(1)(c). The thrust of the questions presented went to the effect of the transfers of the workpapers from the accountant to the Taxpayers and from the Taxpayers to their attorney. Neither the questions presented in the Petition nor the accompanying legal argument adequately apprised the Court or Respondents of the Government's position in its Brief that the papers in this case belonged to a collective entity and that they were non-testimonial in nature. These issues were smuggled into the Government's Brief in violation of Rule 40(d)(2) after this Court granted certiorari. See also, *Irvine v. California*, 347 U.S. 128, 129 (1954).

Lastly, we subn it that the Court should not consider these issues because they were presented in a Brief filed *six weeks* beyond the deadline set by the third extension of time for filing, without even a motion for leave to file late.

Under these circumstances the "collective entity" and non-testimonial nature issues should not be considered on review. Alternatively, all costs of this appeal should be taxed against the Government, regardless of the outcome.

2. The Government contends that the accountant's workpapers in this case are not protected by the Taxpayers' privilege against self-incrimination because they are records of a collective entity. We agree that application of this exception to the availability of the privilege turns on an examination of the "essential character" of the papers and on whether they are possessed by the Taxpayers in a purely personal capacity. We disagree, however, with the Government's position that the "essential character" of the papers in question is determined by (1) whether the papers are owned by a collective entity, (2) whether they were created by a member of a collective entity, and (3) whether they were possessed by a collective entity at some time prior to the issuance of the summons.

Taxpayers submit that the cases concerned with the collective entity exception, from *Wilson v. United States*, 221 U.S. 361 (1911), to *Bellis v. United States*, 417 U.S. 85 (1974), establish that the organizational character of the documents in question was determined by the organizational character of the transactions to which such documents referred and by the fact that such documents were created on behalf of the collective entity

and in furtherance of its purposes. The cases do *not* demonstrate that ownership, authorship and prior possession are relevant to a determination of the "essential character" of the documents.

The workpapers in this case are not papers of a collective entity because they describe only the personal transactions of the Taxpayers, they were prepared on their behalf and in furtherance of their purposes, and they are based entirely on information which the Taxpayers provided to the accountant. Whatever nominal property interest the accountant had in the papers cannot overcome the Taxpayers' "significant personal interest" in them. The Government's attempt to make ownership of the papers determinative of the availability of the Fifth Amendment privilege must fail since it flies squarely in the face of this Court's contrary rule stated in *Couch v. United States*, 409 U.S. 322 (1973).

Further, the collective entity exception is simply inapplicable to the papers in this case because they are possessed by the Taxpayers in a purely personal capacity. This Court stated in *United States v. White*, 322 U.S. 694, 699 (1944), that ". . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added).

The Government's interplay of semantics to describe the Taxpayers' possession as "custodial rather than personal" and as a "gratuitous bailment," Pet. Brief at 27, is of no relevance to a determination of the scope of the privilege. The question of a bailment has no impact upon the capacity in which a

non-owner possessor or bailee holds the property. The opinions of this Court offer no support for the proposition that possession of property in a purely personal capacity is inconsistent with possession by a non-owner or possession in a "custodial capacity." Furthermore, the use of the phrase "possession in a purely personal capacity" in *White* was meant to distinguish such possession from possession in a representative capacity and did not relate to any distinction between possession by an owner and by a non-owner bailee.

In this case, the papers were transferred to the Taxpayers by the accountant, who relinquished to the Taxpayers the "rightful, indefinite and legitimate possession" of them. (A. 17). Since the Taxpayers' possession of the papers was solely for their benefit and not for the benefit of their accountant, and since the accountant did not seek to limit or control the manner in which Taxpayers could make use of them, the Taxpayers held the papers in a purely personal capacity. *English v. Dhane*, 294 S.W. 2d 709 (Tex. 1956); *Gathright v. Carl Markley Motor Co.*, 146 S.W. 2d 307, 311 (Tex. Civ. App.-Beaumont, 1940, no writ). The Taxpayers were not officers, members or agents of the accounting firm; thus, their possession of the papers was not in a representative capacity.

The underlying basis for this Court's collective entity decisions is found not so much in the necessity for governmental regulation of collective entities, important as that may be, as in the need to prevent a purely private privilege from being extended to impersonal records in which the claimant has no significant personal interest. See *Bellis v. United States*, 417

U.S. 85, 93 (1974). But, where a significant personal interest in papers exists, as it clearly does in this case, that interest may not be disregarded in favor of the governmental interest in the regulation of collective entities without serious impairment to the fundamental values protected by the Fifth Amendment privilege.

The effect of extending the collective entity exception to client files will be to put a premium on the services of sole practitioners since "the privilege applies to the business records of . . . sole practitioners" *Bellis v. United States*, 417 U.S. 85, 87-88 (1974). But no valid constitutional principle is served by making the availability of the privilege turn on whether the accused consults an accountant who is a sole practitioner rather than a member of a professional corporation or partnership. A professional's membership in a professional corporation or partnership may be relevant in terms of the availability of the privilege to the professional, for he has chosen the manner in which he shall do business, but it should not control the constitutional rights of those he serves.

3. In close relation to its collective entity argument, the Government contends that the workpapers are not the "private papers" of the Taxpayers, and, therefore, are not subject to the privilege. The Government contends that because the papers were prepared by the accountant, albeit with information from the Taxpayers, and because some of that information was previously disclosed in the Taxpayers' income tax returns, the subsequent transfer of the workpapers to the Taxpayers does not reinvest them with constitutional protection.

Wilson v. United States, 221 U.S. 361, 378 (1911) disposes of the argument that papers are non-private if written by someone other than the accused. Moreover, Nothing in this Court's prior decisions on the availability of the privilege supports the Government's novel theory that prior disclosure of information in a document places that document forever beyond the reach of the privilege. Application of the privilege has never depended upon the degree of privacy with which the records were created or maintained. *United States v. Cohen*, 388 F.2d 464, 471 (9th Cir. 1967). Rather this Court's use of the term "private papers" has always indicated that such papers were simply papers that were not public or quasi-public in character. See, e.g., *Davis v. United States*, 328 U.S. 582, 588-589 (1946).

This Court's reference to an "expectation of privacy" in *Couch v. United States*, 409 U.S. at 335, does not dictate a different result. This Court's reference to an "expectation of privacy" was made in response to the argument that the accountant's possession of the papers should be deemed the equivalent of possession by the accused. In finding an insufficient expectation of privacy to establish the basis for "constructive possession," the Court did not address the situation where actual possession or control of the papers had been returned to the accused. *Couch* does not therefore establish "expectation of privacy" as an independent test that must be met even when the records have been returned to the Taxpayer or Taxpayers' attorney and when personal compulsion against the Taxpayers will necessarily result from enforcement of the summons.

The Government would have this Court replace the concept

of personal compulsion, central to the Fifth Amendment privilege, with a concept of "privacy." To do so not only contravenes the essence of the privilege, but invites endless inquiry into the prior custodial history of records in order to deny an otherwise valid claim of privilege on the grounds that the accused or his predecessor has not maintained the records with sufficient secrecy.

But even if it is necessary for the Taxpayers to show an "expectation of privacy" in the workpapers in order to claim their constitutional privilege, Taxpayers maintain that they had a "legitimate expectation of privacy" in the workpapers *at the time the summons was served* upon their attorney. Since this Court has held that the "rights and obligations of the parties became fixed when the summons was served," *Couch v. United States, supra,* 409 U.S. 329, n. 9, that was the time to examine the legitimacy of Taxpayers' expectation of privacy and not when the information in the papers was originally provided to the accountant. In *Couch,* the accused's expectation of privacy when the summons was served was no greater than when she delivered the papers to her accountant. In the instant case, on the other hand, the Taxpayers' expectation of privacy when they delivered the papers to their attorney cannot be questioned.

Since the accountant's workpapers were the "private papers" of the Taxpayers in every relevant respect except ownership, the forced production of them from the Taxpayers' attorney would compel self-incrimination, in violation of the Fifth Amendment.

4. The Government has conceded before this Court that

the transfer of the accountant's workpapers to the attorney should "neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession" (Pet. Brief at 36). It has also conceded that "if the taxpayer had transferred his own private papers to his attorney for purposes of preparing his defense, the Fifth Amendment privilege would have protected them from foreclosure" (Pet. Brief at 36, n. 16). The Court should accept these concessions since they are well founded.

An attorney's possession of papers on behalf of a client whom the attorney is representing should be deemed the "constructive possession" of the client sufficient to warrant assertion of the client's privilege. Unlike the transfer of documents to an accountant, the "transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given." *Couch v. United States,* 409 U.S. 322, 330 (1973) (Mr. Justice Marshall, dissenting opinion).

Furthermore, the transfer of records to an attorney who is representing the client in the matter under investigation is generally made in order to secure the informed advice of counsel as to the proper exercise of the privilege. *United States v. Judson,* 322 F.2d 460, 468 (9th Cir. 1963), without which the privilege might be lost. See *Maness v. Meyers,* 43 U.S.L.W. 4143, 4149 (Jan. 15, 1975). To deny an accused his Fifth Amendment privilege because the documents he seeks to protect have been turned over to his attorney would therefore

put a price on efforts to assert the privilege in an intelligent and informed manner and would put the accused to an unconstitutional Hobson's choice between his administratively conferred right to consult with counsel, on the one hand, IRS News Release IR-949 (1969), CCH Fed.Tax.Rptr. ¶6946; *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969); Cf. *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir. 1960), and his constitutional right not to incriminate himself, on the other. *Gardner v. Broderick*, 392 U.S. 273, 277 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967).

Finally, since access to counsel is an important aid to the effective exercise of the privilege, *Maness v. Meyers, supra*, a rule that would deny the privilege because the records were in the possession of an accused's attorney, would effectively increase the governmental compulsion upon the accused. The compulsion upon the accused is therefore not removed, but simply allowed to take a more subtle form. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). For these reasons, the Government's concession should be accepted and the attorney's possession should be deemed to be the client's possession for Fifth Amendment purposes.

5. The Government's argument that the papers involved in this case are not testimonial must be rejected. The accountant's workpapers are being sought for their content, i.e., for what they say and not for the physical properties of the paper, the ink or the accountant's handwriting. The Government's reliance on *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973); and *United States v. Mara*, 410 U.S. 19 (1973) is therefore misplaced.

The argument that the Taxpayers will not be incriminated by production of the workpapers since the accountant, rather than the Taxpayers, can be used to authenticate them, must also be rejected. The scope of the privilege includes, but is not limited to, the testimonial character of the act of production. See *Curcio v. United States*, 354 U.S. 118, 125 (1957). It also embraces compulsory disclosure of documents extracted from an attorney in constructive possession for the accused where the accused is the source of the information contained in the writings, irrespective of who produces or authenticates them. Cf. *United States v. Nobles*, 43 U.S.L.W. 4815, 4818 (June 23, 1975); *Couch v. United States*, 409 U.S. 322, 333 (1973); *United States v. Dionisio*, 410 U.S. 1, 7, n. 6 (1973); *Schmerber v. California*, 384 U.S. 757, 763-764, 765 (1966); *Gouled v. United States*, 255 U.S. 298, 306 (1921). In that situation, the papers themselves contain communications of the accused, albeit reduced to writing by someone else, since the accused is the testimonial source of the information in the workpapers. Their compelled production is therefore forbidden, irrespective of who physically produces them.

The fact that the accountant may be able to authenticate the workpapers at a subsequent legal proceeding does not, of course, justify the use of legal process to obtain them if their contents would incriminate the accused. The Fifth Amendment protects against the incriminating disclosure itself and not just its admissibility into evidence. *Maness v. Meyers*, 43 U.S.L.W. 4143, 4148 (Jan. 15, 1975).

6. Lastly, the Government contends that an attorney has

no standing to assert his client's Fifth Amendment privilege when the attorney is served with a summons, even though the client could assert the privilege. The Court below held that there was no unanimity among the Courts on this issue, but found that "the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege" *United States v. Kasmir*, 499 F.2d 444, 454 (5th Cir. 1974).

Those cases which have held otherwise, e.g., *Bouschor v. United States*, 316 F.2d 451, 458-459 (8th Cir. 1963), have all been based on a misreading of dicta in this Court's decision in *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) which did not even involve an attorney-client relationship, but an employment relationship in which an employee tried to assert the privilege on behalf of a public entity which had no Fifth Amendment right. See discussion by Ainsworth, J., dissenting, in *United States v. White*, 477 F.2d 757, 766, n. 4 (5th Cir. 1973), *aff'd. per curiam en banc*, 487 F.2d 1335, *cert. den.* 419 U.S. 872 (1974). What these cases have overlooked is that an attorney, unlike any other agent, is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and assertion of the privilege is the client's appearance and assertion of the privilege, *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963), and is not an attempt by one person to assert someone else's privilege to protect himself. The fact that the privilege against self-incrimination is sometimes spoken of as a "personal" privilege of the claimant, *Couch v. United States*, 409 U.S. at 327, in

no way disposes of the question of whether a witness may assert his personal privilege through counsel or must do so himself. The attorney-client privilege is also a "personal" privilege, *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922); 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961), but the attorney can and even has the duty to assert the privilege for and on behalf of his client whenever it may be applicable. *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *Ex Parte Lipscomb*, *supra*, 239 S.W. at 1103. Since it is well established that statements made by an attorney acting within the scope of his authority are binding as admissions of the client, *Laird v. Air Carrier Engine Service*, 263 F.2d 948 (5th Cir. 1959), one would think the client would be equally entitled to enjoy the beneficial effects of that advocacy.

Substantial policy reasons favor permitting an attorney to assert the privilege on behalf of his client. First, occasions can arise where the client is unavailable, but the attorney is summoned to produce the private papers of the client in his possession. In such circumstances, the attorney must be free to assert the privilege on his client's behalf or both the attorney and the client will be subjected to a significant inhibition of their freedom of consultation. Since it cannot be known in advance when such occasions will arise, the only way to avoid an inhibition on attorney-client consultations is to permit the attorney to assert the privilege for his client whenever the attorney is made the object of an inquiry directed at his client. This policy is the same one that permits the attorney to assert the attorney-client privilege on his client's behalf.

Another reason to permit the attorney to assert the privilege on his client's behalf is to avoid the loss of time, money and substantive rights to the client. While a refusal to permit the attorney to resist production of his client's records in his custody on the ground of standing does not appear to result in a waiver of the privilege since the client can move to suppress the evidence in a later criminal prosecution, *Donaldson v. United States*, 400 U.S. 517, 531 (1971), this Court has held that the motion to suppress is not the equivalent of the right not to produce at all. *Maness v. Meyers*, 43 U.S.L.W. 4143, 4147 (Jan. 15, 1975). Moreover, both the accused and the Government are forced to expend time and money on a prosecution that might otherwise never have been brought.

Finally, the standing issue is grounded in a matter of procedural convenience within the complete control of the Government and elevates form over substance. It is a well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party or witness himself, even though the document in question may be in the possession of his attorney. *In re Ruppert*, 309 F.2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware*, 11 F.R.D. 44 (S.D.N.Y. 1951). Indeed, the Government represented to this Court in *Couch v. United States* that such was its practice. 409 U.S. 334, n. 18. Since the real parties in this case were the Taxpayers, the summons could just as easily have been served upon them as upon their attorney and no "standing" issue would have existed. The fact that the Government chose to serve the Taxpayers' attorney in this case is a mere matter of its own procedural convenience and should neither diminish

the Taxpayers' rights nor enhance the Government's.

The sole policy reason cited by the Government for requiring the Taxpayers to assert their right in person is simply untenable. The Government argues, relying on *Hoffman v. United States*, 341 U.S. 479 (1951), that they must have the accused assert his privilege in person so that the court may inquire into the basis of the claim (Pet. Brief at 41). However, *Hoffman* was not a standing case, but dealt instead with the question of whether a substantial danger existed for self-incrimination if the accused answered the questions put to him. Moreover, *Hoffman* involved oral testimony, *not* documentary evidence. In the instant case, the Fifth Circuit correctly observed that the "incriminating character of the materials sought here has never been put in issue" *United States v. Kasmir, supra*, 499 F.2d at 451, n. 4. The oral testimony of the accused could hardly be expected to shed light on the incriminating character of the papers. But even if that were a genuine possibility, the Government was free to subpoena the Taxpayers and call them as witnesses in the case. It made no effort to do so, preferring to hide this objection from the court and opposing counsel until after the close of evidence in the case (A. 69).

To date, this Court has held that "in the event the taxpayer is not a party to the summons before the hearing officer, he . . . *may* intervene" *Reisman v. Caplin*, 375 U.S. 440 (1964) (emphasis added). This Court has *never* held that he *must* intervene in order to assert his rights when the summons is directed to his attorney. However, if that should be the Court's ruling in this case, Taxpayers ask that it be made prospective

only and that they be allowed to secure the benefit of this Court's ruling on the merits by intervening within a stated period of itme after the case is remanded to the District Court.

ARGUMENT

I.

SEVERAL OF THE ISSUES RAISED BY THE GOVERNMENT IN ITS BRIEF ARE NOT PROPERLY BEFORE THIS COURT FOR REVIEW BECAUSE THEY WERE NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW, WERE NOT SET FORTH OR FAIRLY COMPRISED WITHIN THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI, AND WERE NOT PRESENTED IN A BRIEF THAT WAS TIMELY FILED UNDER THIS COURT'S OWN RULES.

Among the issues that the Government has raised in its Brief for review by this Court are: (1) the question whether accountant's workpapers are the papers of a collective entity to which no claim of privilege may attach (Pet. Brief at 14, 21-23) and (2) the question whether production of accountant's workpapers would be testimonial or communicative in nature (Pet. Brief at 16, 33-35). Important and interesting as these questions may be, however, Taxpayers would point out that they were neither presented to nor considered by the courts below.

An examination of the Government's Brief filed in the District Court, a copy of which has been included in the Appendix in this Court (A. 30-33), and an examination of

the argument of counsel for the Government (A. 68-69, 75-77), will show that neither of the questions mentioned above was ever raised in the court of first instance. There was likewise no reference in the Court of Appeals to the collective entity exception to the Fifth Amendment privilege, or to any contention that production of accountant's workpapers would not be testimonial or communicative in nature. (See Brief For the Appellees In the United States Court of Appeals for the Fifth Circuit, copies of which have been lodged with the Clerk of this Court.) Indeed, the total absence of these issues in the lower court proceedings is evident not only from the fact that neither issue is discussed in the opinions rendered below in No. 74-611, but also by the very simple fact that none of the collective entity cases from *Wilson v. United States*, 221 U.S. 361 (1911) through *Bellis v. United States*, 417 U.S. 85 (1974), relied on so extensively by the Government in this Court, and none of the authorities on the testimonial or communicative nature of the privilege to which this Court's attention is now directed, e.g., *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973); and *United States v. Mara*, 410 U.S. 19 (1973), are so much as mentioned in any of the Government's Briefs filed in the lower courts. Under all the circumstances, Taxpayers submit that these issues are being presented for the first time on appeal to this Court, in derogation of an orderly appellate process, and that such issues are therefore not properly before this Court for review.[1]

[1] An examination of the Government's Briefs in the lower courts will show that the Government relied principally on three theories in opposing Taxpayers' claim of privilege. It argued, relying on *Couch v.*

It is well established that in cases of this kind, this Court sits as a Courtof review, not a Court of original jurisdiction, and therefore only in the most exceptional circumstances will it entertain questions not raised or considered by the lower courts. *United States v. Estate of Donnelly*, 397 U.S. 286, n. 5 (1970); *Lawn v. United States*, 335 U.S. 339, 362, n. 16 (1958); *Dunigan v. United States*, 274 U.S. 195, 200 (1927); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1916). Cases involving the Fifth Amendment privilege fall within this rule, *United States v. Nobles*, 43 U.S.L.W. 4815, 4817, n. 4 (June 23, 1975), and it binds the Government no less than private litigants. *United States v. Hoth*, 207 F.2d 386, 389 (9th Cir. 1953). There are no exceptional circumstances in this case which would justify consideration of issues not properly preserved in the courts below. See *Lawn v. United States, supra*,

Footnote 1 continued:

United States, 409 U.S. 322 (1973), that Taxpayers could not assert their privilege because they did not own the records in question; it argued that enforcement of the summons would not exert compulsion against the Taxpayers since the records were not in their possession, but in the possession of their attorney; and it argued that possession by Taxpayers and their attorney was not "rightful" because possession of the records had been transferred to the Taxpayers after they learned of the Government's investigation. None of these arguments is presented on this appeal. The ownership theory has been abandoned, and reappears only as one of the pegs on which to hang the collective entity argument; the transfer of possession to the attorney has been conceded neither to enlarge nor diminish the Taxpayers' rights (Pet. Brief at 36); and the theory that a transfer is not "rightful" if made after knowledge is acquired of a Government investigation, while seemingly covered by the questions presented for review, has not been argued in the Government's Brief, and is therefore abandoned. *Russell v. United States*, 369 U.S. 749, 754, n. 7 (1962); *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 651, n. 4 (1950). In fact, except for the issue of an attorney's standing to assert the privilege on behalf of his client, the theories on which the Government says it should prevail in this Court bear no resemblance to the arguments it made in the courts below.

335 U.S. at 362, n. 16. Cf. *United Brotherhood, C & J v. United States*, 330 U.S. 395, 412 (1947). Consequently, these issues should not be considered on review by this Court.

Taxpayers also contend that the above-mentioned issues were not adequately set forth in the Government's Petition for Writ of Certiorari nor fairly comprised within the Questions Presented as required by Rule 23(1)(c) of this Court. The only question presented, apart from the standing issue, was:

> Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to produce an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

The thrust of the question presented was the effect, on the claimant's right to invoke his privilege, of a transfer from the accountant to the claimant and thereafter from the claimant to his attorney. These were the issues briefed and argued by the Government in the lower courts. The question does not, however, adequately set forth or comprise the argument that accountant's workpapers belonging to a collective entity are unprivileged no matter who holds them, or the argument that the production of an accountant's workpapers is non-testimonial or non-communicative in nature.

A comparison of the question presented in this case with the Government's efforts to raise similar questions in other cases shows that the Government has had no difficulty in the past in explicitly stating its position when such position was

known to it at the time the Petition for Writ of Certiorari was filed. In *Bellis v. United States,* for example, the argument that a law firm's financial records were not subject to a claim of privilege because the papers in question were the papers of the partnership was stated as follows:

> Whether a former partner in a dissolved law partnership is entitled to invoke the Fifth Amendment privilege against self-incrimination as a ground for refusing to comply with a grand jury subpoena to produce business records maintained by the partnership while he was a member, where the records had come into his possession after the dissolution.

Government's Brief in *Bellis* at 2.

The thrust of the question in *Bellis* was whether the individual attorney had a right to invoke the privilege with respect to business records that were "maintained by the partnership while he was a member." In contrast, the question presented in this case doesn't even mention the fact that any partnership or other business entity had any connection with the accountant's workpapers. Moreover, unlike the *Bellis* case, which discussed the nature and size of the partnership in the text of the petition, and made the importance of such fact clear to the Court, the text of the Petition here is devoid of any such discussion. The legal argument gives no indication whatever that a partnership or other collective entity is involved or that such involvement creates an issue of any importance.

The presentation of the dichotomy between testimonial and non-testimonial evidence in the Petition is impossible to find. This issue is not once mentioned anywhere in the Petition, nor are any of this Court's cases on the subject so much as cited.

Under the circumstances, it is the Taxpayers' position that the question presented in this case was completely inadequate as a means for informing Respondents or this Court of the Government's intentions to raise either the collective entity concept or the dichotomy between testimonial and non-testimonial evidence, particularly in view of the fact that neither argument had been made in the lower courts. Indeed, Respondents' complete ignorance of the Government's intentions in this regard, even after reading its Petition, is seen from the Brief of Respondents in Opposition in which Taxpayers discussed what they conceived to be the issues presented for review. Not until receipt of the Government's Brief was it apparent that the Government's entire theory of the case had been radically altered before this Court.

Taxpayers submit that inclusion of the issues mentioned above in the Government's Brief is contrary to the rule that this Court's "consideration will be limited to the question presented by the petition for the writ of certiorari," *Mazer v. Stein,* 347 U.S. 201, 208 (1954), and constitutes an impermissible attempt to smuggle new issues into the case not covered by this Court's original grant of the writ. Rule 40(d)(2) of the Supreme Court Rules clearly provides:

> . . . the brief may not raise additional questions or change the substance of the questions already presented in those documents [the jurisdictional statement or the petition for certiorari].

Moreover, this Court has admonished:

> We disapprove the practice of smuggling additional questions into a case after we grant certiorari.

Irvine v. California, 347 U.S. 128, 129 (1954). See also, *Lawn v. United States, supra,* 355 U.S. at 362, n. 16. For the reasons stated, Taxpayers submit that the Government's efforts to enlarge the issues properly before this Court should be rejected.

Finally, Taxpayers object to the Government's complete disregard of this Court's rules with respect to the timely filing of briefs. As indicated in our letter of June 18, 1975, to the Clerk of this Court (See Appendix to this Brief), the Government received three extensions of time for the filing of its Brief until and including April 30, 1975. We did not oppose and do not complain of those extensions here. However thereafter, having been informed by the Clerk of this Court that no further extensions would be granted, and without requesting any, the Government simply failed to file its Brief for an additional *six weeks* until June 16, 1975. No sanctions were imposed by the Clerk of this Court for late filing.

We object to the Government's total disregard of Rule 41 of this Court and to its failure to offer any explanation or justification for its conduct.

Under all the circumstances, we request that the issues not properly raised by the Government in the courts below, not adequately preserved in the questions presented to this Court, and argued in a Brief that was not timely filed, should not be considered on review by this Court.

In the alternative only, we ask that all costs of this appeal be charged against the Government irrespective of its outcome.

II.

THE PAPERS INVOLVED IN THIS CASE ARE NEITHER THE PAPERS OF A COLLECTIVE ENTITY NOR ARE THEY HELD BY THE TAXPAYERS IN A REPRESENTATIVE CAPACITY.

In shifting its attack from the possession of the records by the Taxpayers' attorney to "the essential character of the papers at issue" (Pet. Brief at 23), the Government invokes a line of decisions in which this Court has rejected the applicability of the privilege against self-incrimination to papers of collective entities such as corporations, associations and partnerships. *Wilson v. United States,* 221 U.S. 361 (1911); *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission,* 221 U.S. 612 (1911); *Wheeler v. United States,* 226 U.S. 478 (1913); *Essgee v. United States,* 262 U.S. 151 (1923); *United States v. White,* 322 U.S. 694 (1944); *Rogers v. United States,* 340 U.S. 367 (1951); *Curcio v. United States,* 354 U.S. 118 (1957); *Bellis v. United States,* 417 U.S. 85 (1974).

As this Court recently noted, this "line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis v. United States,* 417 U.S. at 88. The Government argues that the accountant's workpapers involved in this case "obviously were not private papers of the taxpayers and, we submit, did not become so upon being handed over by the accountants to the taxpayers or upon being handed over by the latter to their attorneys" (Pet. Brief at 23).

Taxpayers agree with the Government that the "essential character" of these records cannot be changed either by a transfer from the accountant to the Taxpayers, or by a transfer from the Taxpayers to their attorney, and Taxpayers have never so argued.[2] However, the Government, in thus misstating Taxpayers' position, itself begs the question regarding the essential character of the papers here in issue.

It is the Government's position that accountant's workpapers cannot be made the subject of a claim of self-incrimination even if they are possessed by the accused himself at the time the summons is served because the "accountant's workpapers . . . were *created* by the Taxpayers' accountant . . . and were *owned* and *maintained* by the accountant until the commencement of the investigations" (Pet. Brief at 23) (emphasis added). From this statement, we understand the Government's position to be that records which are (1) owned by a collective entity, (2) created by a member of a collective entity, and (3) in the possession of the collective entity at some point prior to the issuance of a summons, cannot be made the subject of a claim of self-incrimination under the collective entity cases. However, Taxpayers submit that these criteria have nothing to do with the essential character of the papers at issue, nor with the purpose and policy behind the collective entity exception. A

[2] The constitutional significance of the transfer results from the return of information in the records to the Taxpayers' "private enclave" and the consequent restoration of the element of personal compulsion that was found missing in *Couch v. United States,* 409 U.S. 322 (1973). It has never been Taxpayers' position that such transfer changed the "essential character" of the records for purposes of the collective entity exception since, as previously mentioned, that concept and the authorities urged in support thereof in this Court were never discussed in the courts below.

close analysis of the cases relied upon by the Government shows that this narrow exception to the Fifth Amendment for organizational or institutional papers is based on the fact that such papers describe or refer to the activities and transactions of a collective entity (which itself has no Fifth Amendment privilege) and were initially created on its behalf and for its benefit. These cases are *not* premised upon the organization's ownership of the papers, nor upon the fact that the papers may have been created or stored by one of its members.

A. The Essential Character Of Papers As Organizational Papers Is Not Determined By Their Ownership, Authorship Or Prior Custodial History.

A review of this Court's decisions from *Wilson v. United States,* 221 U.S. 361 (1911) to *Bellis v. United States,* 417 U.S. 85 (1974), reveals that the organizational papers which have been excluded from protection under the Fifth Amendment have all consisted of papers that described the activities and transactions of the collective entity for whose benefit they were made and were, therefore, quite different from the kind of papers involved in this case which have reference solely to the activities of natural persons and were made on their behalf.

In *Wilson v. United States, supra,* the Court said of the letter-press copy books there at issue: "They have reference to business *transacted for the benefit of the group of individuals* whose association has the advantage of corporate organization." 221 U.S. at 382 (emphasis added). In applying this standard, the Court was careful to distinguish between records relating to the personal affairs of a corporate officer, copies of which

were in the possession of the corporation, and documents "relating to the business and affairs of the corporation." 221 U.S. at 378. While sustaining the Government's right to obtain the latter class of documents, the Court found that the personal correspondence of a corporate officer was not covered by the subpoena for corporate documents and was subject to exclusion by the Court even though copies of such personal letters were contained in and made a part of the corporate records. As the Court stated:

> Had the appellant merely sought to protect his personal correspondence from examination, it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books.

221 U.S. at 378. See also *Wigmore on Evidence, Third Edition*, Vol. 8, Section 2259b, where Dean Wigmore notes that ". . . for any documents therein that concern only the 'private or personal' affairs of the officer, the Court may direct their 'withdrawal from scrutiny'."

The *Wilson* decision is also significant in connection with the Government's argument that there is relevance in the identity of the person who created the document in question. In *Wilson*, the Court expressly rejected the notion that the character of books and records for Fifth Amendment purposes was in any way limited or enlarged by the question of authorship. As the Court stated:

> It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. *Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person* (emphasis added).

221 U.S. at 378. See also *People v. Myers*, 35 Ill.2d 311, 220 N.E.2d 297, 310 (1966).

In *Baltimore & Ohio Railroad Company v. Interstate Commerce Commission*, 221 U.S. 612 (1911), decided in the same term as *Wilson*, the Court was called upon to determine whether the collective entity exception was applicable to employee time reports kept by the Railroad. In holding that the exception and not the privilege applied to the records in issue, the Court stated: ". . . *the transactions to which the required reports relate are corporate transactions*, subject to the regulating power of Congress." 221 U.S. at 622 (emphasis added).

In *Wheeler v. United States*, 226 U.S. 478 (1913), the subpoena called for "all the cash books, ledgers, journals, and other books of accounts of the company, and all copies of letters and telegrams of Wheeler & Shaw, Incorporated, whether signed or purporting to be signed by the corporation or by its president or treasurer in its behalf." 226 U.S. at 483. However, the corporation had previously been dissolved and its books and records were both owned and possessed by Wheeler and Shaw, two of its former officers, at the time the subpoena was served. The defendants argued that their ownership and possession distinguished their case from *Wilson v. United States, supra*. The Court conceded that the corporation had left its books and papers "in the possession of the defendants" and it agreed with the defendants that "for many purposes such books belong[ed] to them." 226 U.S. at 490. However, it rejected their

attempt to distinguish the *Wilson* case on grounds of ownership or possession since *neither* factor altered "the essential character of the books and papers." 226 U.S. at 489. As the Court stated:

> We are unable to see that this case differs in principle from that one. It is true the corporation in the present case had ceased to exist, but its books and papers were still in existence and *were still impressed with the incidents attending corporate documents.* Wheeler and Shaw had been officers of the corporation, and the books of the company had, before the dissolution, been made over to them: *but this did not change the essential character of the books and papers,* or make them any more privileged in the investigation of crime than they were before. It was the *character of the books and papers as corporate records and documents* which justified the court in ordering their production, as this court ruled in the Wilson case. We think the character of the books was not changed for this purpose, because the corporation had gone out of existence after making over the books to the defendants. 226 U.S. at 489 (emphasis added).

See also *Grant v. United States,* 227 U.S. 74, 80 (1913) which held that: "Whether or not the title to them had passed to Burlingame when the Ellsworth Company ceased to do business, their essential character was not changed."

The foregoing cases illustrate a significant contradiction in the Government's position that ownership, authorship and the pre-summons possession of accountant's workpapers by the accountant is what determines their essential organizational character. If that were true, how could it be said that after ownership and possession passed to another, "their essential character was not changed"? *Grant v. United States,* 227 U.S.

at 80. Surely if the "essential character" of papers was actually determined by their ownership, authorship or pre-summons possession, a subsequent change in ownership or possession would have some effect on their "essential character." However, since this Court has clearly stated on two occasions that alteration of ownership and possession does *not* change the essential character of the papers, it defies logic and common sense to adhere to the Government's position that ownership and possession were among the factors that initially determined the essential character of the papers.

We submit that this Court has never adopted the contradictory rationale offered by the Government for ascertaining the kinds of papers that fall within the collective entity exception, and that the reason corporate "books and papers were still impressed with the incidents attending corporate documents" even after a change in their ownership and possession, and irrespective of their authorship, is that ownership, possession and authorship were not the factors that initially determined the essential corporate character of the documents. Rather, the corporate character of the documents was determined by the corporate transactions which such documents described and by the fact that the documents were created on behalf of the corporate entity and in furtherance of its purposes. These were the incidents of their corporate character and they remained unchanged no matter who subsequently owned or possessed them or who had initially written them.

Our analysis of the collective entity exception is supported by *United States v. White, supra,* one of this Court's most ex-

tensive expositions of the doctrine. In that case, a union was subpoened to produce "copies of its constitution and bylaws and specifically enumerated union records showing its collections of work-permit fees. . ." 322 U.S. at 695. The Court of Appeals had sustained the claim of privilege tendered by the "assistant supervisor" of the union, principally on the ground that the records of an unincorporated labor union "were the property of all of its members." 322 U.S. at 696. Although this Court acknowledged that "title may be nominally in the names of [the union's] members or trustees," 322 U.S. at 702, it nonetheless reversed the Court of Appeals and implicity rejected ownership as a necessary condition for the exercise of the privilege. As this Court recently said of the *White* case: "Although the Court was aware that the individual members might legally hold title to the union records, the Court characterized this interest as 'nominal' rather than a significant personal interest in them." *Bellis v. United States, supra,* 417 U.S. at 93.

The essence of the *White* decision can be found not in the intricacies of legal title, but in the Court's distinction between "organized institutional activity" and "wholly individual activity." 322 U.S. at 701. White failed in his Fifth Amendment claim because he was unable to demonstrate any "significant personal interest" or constitutionally meaningful nexus between himself as an individual and the documents which he sought to shield with his personal privilege. Since the union records that were subpoened related solely to the group activity of the union and not to the individual activity of any of its members, the only interest White had in such documents was the interest he shared in common with all members of the union, i.e., a

collective interest, not a personal one. Denial of the privilege in such circumstances was largely dictated by the legitimate concern that the privilege not be used to insulate "institutional activity" from governmental regulation where none of the fundamental personal values of the privilege were implicated. As the Court stated:

> Were the cloak of the privilege to be thrown around these *impersonal records and documents,* effective enforcement of many federal and state laws would be impossible. See Hale v. Henkel, supra, 201 U.S. 70, 74, 26 S.Ct. 377, 379, 50 L.Ed. 642; 8 Wigmore On Evidence, 3rd Ed., §2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations" (emphasis added).

322 U.S. at 700.

We think it significant that in the course of its decision the Court repeatedly emphasized that the papers in issue were "*official union documents* held [by the accused] in his capacity as a representative of the union" 322 U.S. at 704 (emphasis added), and that "the subpoena duces tecum was directed to the union and demanded the production *only* of its *official* documents and records" *Id.* (emphasis added). The Court did not differentiate between "official union documents" and other kinds of union papers or between "impersonal records and documents" and more personal ones, but it certainly left open the possibility that records of a truly personal nature to individual union members, even if contained in union files, might be in a

different category from the kind of union records that were then and there under subpoena. In fact, *White* might be said to suggest the proposition that just as the nominal property interest of the union members was insufficient to overcome the essentially institutional character of the union's official records, so also should any nominal property interest of a collective entity in documents relating solely to the activity of a natural person be insufficient to overcome the essentially personal character of such documents so long as the accused can demonstrate a significant personal interest in them.

The legitimacy of this proposition has been recently illustrated by this Court's decision in *Bellis v. United States*, 417 U.S. 85 (1974). Although finding against the accused in that case, this Court was careful to note that the applicability of the collective entity exception to a law firm's financial records did not necessarily mean that the partnership's client files would also be unprotected by the Fifth Amendment. As the Court observed:

> *Significantly*, the District Court here excluded any client files from the scope of its order. See n.1, supra. A different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed *on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership* (emphasis added).

417 U.S. 85, 98, n. 9. See also *U.S. v. James L. Cobb, Jr.*, 75-2 CCH Tax Rptr. ¶9534 (6th Cir. 1975).

There is, of course, no question that accountant's workpapers are included in the category of "client files." Such papers not only consist of "work which [the accountant] has personally

performed on behalf of his client," they consist of papers that are routinely kept separate and apart from the accounting firm's own financial records. Moreover, the fact that accountant's workpapers like other "client files" may be the property of a collective entity cannot, in light of *Bellis*, be of decisive constitutional significance. This Court found the status of such records to present an unresolved question, "even if these files might for some purposes be viewed as those of the partnership." *Id.* Therefore, *Bellis* follows *White* in impliedly finding ownership of summoned records to be of no more than "nominal" significance in determining the applicability of the privilege. As this Court has said, more explicitly in another context, of the relationship between ownership and the purposes and policies behind the privilege:

> To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter and conversations in which the accountant took notes, in addition to the accountant's workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.

Couch v. United States, 409 U.S. 322, 332 (1973).

The Government's collective entity argument in this case with its undue emphasis on ownership is no less an attempt to divert the inquiry from the basic purposes of the Fifth Amend-

ment's protections than was the taxpayer's argument in *Couch*. Indeed, the Government's argument here is basically the same argument that was made in *Couch*, but packaged to suit the Government's needs, rather than those of the accused. However, as we believe we have demonstrated, there is no support in this Court's prior decisions for the proposition that ownership, authorship or the pre-summons possession of papers by a collective entity dictates the inapplicability of the privilege against self-incrimination. Rather, the privilege has been held inapplicable in the collective entity cases cited by the Government because the accused had no "significant personal interest" in the papers in question. In those cases, the *only* connection that the accused was able to demonstrate between himself and the papers under summons was a representative relationship to the organization on whose behalf the papers had been created. Such a basis for invoking the privilege was justifiably deemed constitutionally inadequate.

The facts of this case are very different. The accountant's workpapers which the Government seeks to force the Taxpayers to produce are papers in which the Taxpayers have always enjoyed a significant personal interest, a personal interest which *clearly antedates any of the transfers about which the Government complains.*

To begin with, these records are about the personal affairs of natural persons who *have* a constitutional privilege to assert. They describe *their* personal transactions, not those of the accounting firm.

Secondly, the workpapers were created by the accountant *on behalf of the Taxpayers* in order to make an orderly record of

the *Taxpayers'* business transactions. Irrespective of who physically created them or who now owns them, they were created as a means for implementing the services which the Taxpayers had retained the accountant to perform and in discharge of their commission to him. In creating them, the accountant therefore acted for the benefit of the Taxpayers; not vice versa. As the intended beneficiaries of the accountant's work, Taxpayers have a very definite personal and non-representative interest in the workpapers.

Thirdly, the Taxpayers, *in their individual capacities*, provided the information contained in the workpapers. As the Government admits ". . . the workpapers at issue were prepared by the accountant *on the basis of information disclosed to them by their taxpayer-clients* . . ." (Pet. Brief at 31) (emphasis added). Therefore, irrespective of any mathematical functions which the accountant may perform, the workpapers are fundamentally the Taxpayers' own utterances, once removed. As such, the Taxpayers have a personal interest in the records of substantial constitutional significance since compelling production of these records would in a very real sense compel Taxpayers to bear witness against themselves. Cf. *United States v. Nobles*, 43 U.S.L.W. 4815, 4818 (June 23, 1975).[3] They

[3] This Court stated in *Nobles*:

> Respondent did not prepare the report, *and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator.* The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him (emphasis added).

43 U.S.L.W. at 4818. The very opposite is true of the workpapers involved in this case because they clearly reflect information that has been conveyed to the accountant by the Taxpayers.

would be providing their own statements as recorded or reduced to writing by the accountant. Such a compelled disclosure lies at the very heart of the Fifth Amendment privilege.

Finally, as discussed more fully below, the Taxpayers hold the accountant's workpapers in a personal, not a representative capacity.

For the reasons stated, we submit that on the facts of this case, the accountant's workpapers are not the papers of a collective entity in any constitutionally significant sense, even if they may be viewed as papers of the accounting firm "for some purposes" such as ownership which has only nominal significance in a Fifth Amendment context. To hold otherwise will simply put a premium on the use of an accountant who is a sole practitioner, since his business files would be protected, *Bellis v. United States, supra,* 417 U.S. at 87-88, a result that will neither reflect "the essential character" of the papers in issue, nor accomplish any constitutionally meaningful objective.[4]

B. The Accountant's Workpapers Are Held By The Taxpayers In This Case In A Purely Personal Capacity, Not In A Representative Capacity, And The Collective Entity Cases Are Therefore Inapplicable.

In *United States v. White,* 322 U.S. 694, 699 (1944), this Court stated that ". . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added). The Government has repeatedly emphasized the absence of any ownership rights in the Taxpayers with respect to their accountant's workpapers, but it has completely failed to confront the implications of the italicized disjunctive statement in *White* which clearly recognizes that something short of private property is sufficient to invoke the constitutional privilege against self-incrimination. Indeed, this Court itself has emphasized the italicized language in *Couch v. United States, supra,* 409 U.S. at 330, n. 10, and said of *United States v. Cohen,* 388 F.2d 464, 468 (9th Cir. 1967), in which accountant's workpapers were held but not owned by the taxpayers in their personal capacity, that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate" 409 U.S. at 330, n. 12.

The Government's only response to the assertion that the Taxpayers' records in this case were held in a purely personal capacity, is the somewhat cryptic observation that "where the claimant has physical possession but cannot assert that they are his own personal papers . . ., the claimant's possession is custodial rather than personal" (Pet. Brief at 21). The Government seemingly enlarges upon this point by subsequently saying that the possession of the Taxpayers in this case "could at best be described as a gratuitous bailment" (Pet. Brief at 27). These statements are apparently intended to demonstrate that the accountant's workpapers in this case are beyond the reach of the privilege and within the collective entity exception, because they are somehow not held in a purely personal capacity. If that is the Government's purpose, however, it is wide of the mark.

[4] The Court should note that the record in this case does not indicate whether the accounting firm of Tannebaum, Bindler & Lewis is a sole proprietorship, a partnership or a professional corporation. Nor does it indicate such facts as the size of the firm or the number of its employees. Cf. *Bellis v. United States, supra.*

There is no doubt that papers which are possessed by someone other than the true owner will be the subject of a bailment of some kind. "In general, in bailments possession of the property bailed is severed from the ownership." 8 C.J.S., ***Bailments***, §520, p. 368. But this is simply the inevitable consequence of any situation in which ownership and rightful possession reside in different persons. It does not prove that a non-owner possessor or bailee holds property in other than a personal capacity.

There is no support in the *White* opinion for the thesis that possession in a purely "personal capacity" is in any sense exclusive of or inconsistent with possession by a non-owner bailee or possession in a custodial capacity. The term "possession in a purely personal capacity" in *White* was intended to communicate the constitutional insufficiency of possession in a "representative capacity" since possession of papers in a representative capacity was deemed an inadequate basis for the use of a purely personal privilege. As such, possession in a "personal capacity" was juxtaposed to possession in a representative capacity and had nothing to do with any distinction between possession by an owner and a non-owner. As this Court stated in *Bellis v. United States, supra,* in describing the scope of the collective entity exception as expounded by the *White* case:

> . . . the records subpoened must in fact be organizational records *held in a representative capacity* (emphasis added).

417 U.S. at 93.

Assuming, for the sake of argument, that Taxpayers' possession of the accountant's workpapers in this case constituted no more than a gratuitous bailment, as the Government argues, the existence of such a bailment would in no sense be inconsistent with Taxpayers' possession of such papers in a personal and non-representative capacity since a bailment does not necessarily or even generally include an agency. 2A C.J.S. *Agency* §8, pp. 563-564. As the Supreme Court of Texas has stated:

> While an agent is frequently a bailee, *generally in cases of bailment the agency relation does not exist as the bailor ordinarily has no control over the bailee and is not responsible to others for his acts* (emphasis added).

English v. Dhane, 294 S.W.2d 709, 711 (Tex. 1956).

The record in this case shows that the accounting firm of Tannebaum, Bindler & Lewis relinquished to the Taxpayers the "rightful, indefinite and legitimate possession" of the documents and files in its possession (A.17). There is no evidence that in conveying the records to the Taxpayers the accountants sought in any way to limit or control the manner in which Taxpayers would make use of them.[5] Nor is there any evidence or finding that the records in this case were transferred to the Taxpayers for the benefit of the accountants. All indications are that the transfer was for the sole benefit of the Taxpayers.[6]

---

[5] Cf. *English v. Dhane, supra,* 294 S.W.2d at 711, where the Court said:
The record is wholly void of any evidence that English had claimed or exercised any control over Peters in the latter's operation of the car at the time in question, and in that situation there can be no agency.

[6] Cf. *United States v. Fisher,* 500 F.2d 683, 696 (3rd Cir. 1974) (Hunter, J., concurring in part and dissenting in part):
It is undisputed that the "analyses" were prepared for the Goldsmiths from their own records and papers and pertained to their own business affairs. They obtained the "analyses" from Berson

Since it is well established that a bailee who takes possession of property in furtherance of his own interests rather than in furtherance of the interests of the bailor is not the bailor's agent, *Gathright v. Carl Markley Motor Co.*, 146 S.W.2d 307, 311 (Tex. Civ. App.—Beaumont, 1940, no writ); *Bertrand v. Mutual Motor Co.*, 38 S.W.2d 417 (Tex. Civ. App.—Eastland, 1931), it is clear that the records in this case were not held by the Taxpayers in a representative capacity on behalf of the accountants.[7] Indeed, the unlikelihood of such a relationship existing is further illustrated by the fact that the accountant is acting for and on behalf of the Taxpayers, not the other way around. Under all the circumstances, the Government's argument that Taxpayers' possession of the accountant's workpapers in a custodial capacity or as a bailment somehow constitutes possession in other than a "personal capacity" must be rejected, and with it, we submit, any basis for holding that the collective entity cases from *Wilson* to *Bellis* have any proper application to the case at bar.

C. Where The Accused Has A Significant Personal Interest In The Records In Question, That Interest May Not Be Subordinated To Or Disregarded In Favor Of The Governmental Interest In Regulating Collective Entities Without Seriously Impairing The Fundamental Values Protected By The Fifth Amendment.

The collective entity exception was created to meet the

---

footnote 6 continued:

for their own personal purposes and did not hold them in furtherance of any objective of Berson, or as agent of Berson.

[7] See *Van Brunt & Davis Co. v. Harrigan*, 8 S.D. 96, 98, 65 N.W. 421, 422 (1895), where the Court stated:

The term "representative capacity" is a well-understood term, and only applies to a party acting for and in behalf of some other party or estate, and not for himself personally.

limited objective of preventing a purely private privilege from being extended to impersonal records in which the claimant had no significant personal interest. So limited, it is beneficial. Like many valid principles, however, it is potentially harmful when applied to facts at variance with the necessities which engendered it. There is no denying the significant personal interests which Taxpayers have in an accountant's workpapers, the contents of which they have provided to the accountant. Such papers, like the notes a psychiatrist takes at a session with a patient, like notes a clergyman might make in the confessional, or like an attorney's memorandum to the file concerning a client's affairs, may in a proprietary sense and in terms of authorship be the professional's, but they are in substance the personal record of the patient, parishioner or client. No valid constitutional principle is served by making the availability of the Fifth Amendment privilege turn on whether the professional who is consulted is a member of a professional corporation or partnership. That fact may be significant in terms of the availability of the privilege to the professional, for he has chosen the manner in which he shall do business, but it should not control the constitutional rights of those he serves.

The importance of this distinction may be seen in the facts of the *Boyd* case, even though it antedated the principle here under discussion. The invoice in that case was at one time owned, prepared and possessed by the Union Plate Glass Company which issued it to E. A. Boyd & Sons. Conceding for the sake of argument that E. A. Boyd & Sons would today have no privilege since it operated as a partnership, would the privilege have been disallowed even to a natural person who had come

into possession of the invoice in a non-representative capacity simply because the issuer of the invoice conducted its business as a collective entity? We think not. In essence, however, that is the thrust of the Government's argument in this case.

Taxpayers submit that there are few records in this world that were not at some point in time prepared, connected with or held by a collective entity. Invoices, stock certificates, bills of sale, contracts, notes, letters and other documents may have both personal and organizational characteristics. But that should not render them unprivileged in the hands of a natural person.[8]

We do not, of course, downgrade the legitimate interests of the Government in the regulation of collective entities. The collective entity cases themselves manifest that concern, although in a context where the Government's regulatory interest was considerably stronger than it is here because its inquiry was limited to records describing the activities of the collective entity. Whatever the strength of that interest, however, the collective entity cases are not bottomed on the proposition that the "significant personal interests" of the accused are to be swept away in the tide of governmental necessity. Rather the authorities relied on by the Government are based primarily on the complete absence of any significant personal interest or constitutionally meaningful nexus between the accused and the records in question.

In this case, the requisite personal interests of the accused

[8] Cf. *Boyd v. United States*, 116 U.S. 616 (1886) (company invoice); *Ex Parte Wilson*, 47 S.W. 996 (Tex. 1898) (partnership bill of sale); *Chambliss v. State*, 231 P.2d 711, 713 (Okla. 1951) (State motor fuel license).

are present. In this situation, we submit that the significant personal interests of the accused may not be subordinated to or disregarded in favor of the governmental interest without seriously impairing the fundamental values protected by the privilege.

III.

ACCOUNTANT'S WORKPAPERS DO NOT BECOME PUBLIC OR QUASI-PUBLIC IN NATURE SIMPLY BECAUSE PORTIONS OF THEIR CONTENTS MAY HAVE PREVIOUSLY BEEN DISCLOSED IN THE TAXPAYERS' INCOME TAX RETURNS.

Closely related to the Government's argument that the accountant's workpapers in this case are the papers of a collective entity is the argument that they are not the private papers of the Taxpayers. Relying primarily on *Boyd v. United States*, 116 U.S. 616 (1886), and this Court's decision in *Couch*, the Government argues that only the private papers of the accused are within the protection of the privilege (Pet. Brief at 30-33). Workpapers of an accountant, it contends, are not the private papers of the accused because they are prepared by an outside accountant (Pet. Brief at 31) and because much of the information they contain has been previously disclosed in the Taxpayers' income tax returns. In the Government's opinion, these circumstances defeat any reasonable expectation of privacy which the Taxpayers might have in the workpapers and the subsequent return of the workpapers to their custody does not reconvert them to the private papers of the accused so as to make them subject to a claim of privilege (Pet. Brief at 33).

The first part of the Government's argument regarding the

preparation of workpapers by a person other than the Taxpayers is clearly disposed of by *Wilson v. United States, supra,* 221 U.S. at 378, where this Court flatly stated: "Where one's *private documents* would tend to incriminate him, the privilege exists though they were actually written by another person" (emphasis added). Plainly the concept of "private documents" is not inconsistent with authorship by a person other than the accused.

Taxpayers also submit that there is no requirement that information in "private papers" be previously undisclosed in order for the privilege to attach. In *Boyd v. United States, supra,* the case which originated the term "private papers," the Court extended the protection of the privilege to an invoice issued by the Union Plate Glass Company, a record of which had been entered by E. A. Boyd & Sons at the office of the Collector of Customs at the Port of New York on entry No. 47,108. 116 U.S. at 619. The invoice covered some twenty-nine, out of a total of thirty-five, cases of plate glass that had been forfeited to the Government under a statute that made it a criminal offense for any person to make false entries of imported merchandise "by means of any fraudulent or false invoice . . .". 116 U.S. at 617. Since it must have been obvious to the Court that the entry in the books of the Collector of Customs derived at least in part from information in the invoice (indeed, that was an element of the offense), and since the invoice had been issued by the Union Plate Glass Company, a company apparently based in Liverpool, England, to E. A. Boyd & Sons in New York, the fact that the contents of the invoice were created by and known to persons other than the

claimants, and the fact that information taken from the invoice had been previously disclosed to an agency of the United States Government, was not deemed inconsistent with the claim of privilege or with the term "private papers." Since the same Court which originated the term "private papers" used it to describe a paper which had the same relationship to the customs entry as a workpaper has to an income tax return, i.e., information from one paper was used to prepare the other, we see no valid basis for adopting the Government's novel theory that prior disclosure of information in a document places that document forever beyond the reach of the privilege. As the dissenting Judge noted in No. 74-18 below:

> If by "private" the majority is referring to the origin of the papers at issue, I believe its reliance on *Boyd* is misplaced. In *Boyd* the privilege was sustained with respect to business invoices prepared and *previously published by a party other than the citizen asserting the privilege* (emphasis added).

500 F.2d at 700.[9]

There is nothing in this Court's decisions subsequent to *Boyd* which would sustain the Government's prior disclosure theory. Although this Court has on occasion referred to "private" or

[9] We recognize that in *Bellis v. United States, supra,* 417 U. S. at 95, n. 2, this Court pointed out that the potential significance of the invoice in *Boyd* being a partnership record held in a representative capacity was not observed by the parties or the Court at this early stage in the development of Fifth Amendment jurisprudence. However, while the significance of the record as a partnership record might not have been apparent at that time, we hardly think it possible that the Court could have overlooked the fact that the contents of the invoice in question had previously been disclosed to persons other than the accused, if the accused's right to claim the privilege had in any way depended upon the absence of such a prior disclosure, or if the term "private papers" had been inconsistent therewith.

"personal" records in later cases, the context has never indicated that application of the privilege depended upon the degree of privacy with which records were created or maintained. Rather private records were any records that were not public or quasi-public in character. See, e.g., *Davis v. United States*, 328 U.S. 582 (1946).[10] As the Court of Appeals for the Ninth Circuit said in *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), in rejecting the very argument now made to this Court:

> Statements in *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), that the privilege applies to "personal" or "private" records do not support the government's position. As this court pointed out in *United States v. Judson*, 322 F.2d 460, 464 (1963), the Supreme Court intended only to distinguish between records of a natural person which are entitled to Fifth Amendment protection in appropriate circumstances and records of an impersonal organization which are never entitled to such protection. Since the latter are open to inspection by the government at its pleasure, so far as the privilege against self-incrimination is concerned, they may properly be characterized as quasi-public in character. There is nothing in *White* or earlier cases to suggest that the Court intended to base Fifth Amendment consequences upon the degree of privacy which attended the creation or maintenance of particular records or upon the degree of the intimacy of the information which they contain.

388 F.2d at 471.

Couch v. United States, 409 U.S. 322 (1973), is likewise of

[10]As the Court stated in the *Davis* case:

> The coupons remained the property of the Office of Price Administration and were at all times subject to recall by it. And they were subject to inspection at all times. We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen (emphasis in original).

328 U.S. at 588-589.

no real support to the Government. It is true that *Couch* held that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." 409 U.S. at 335. But this statement was made in response to petitioner's argument that seizure of records from her accountant, which she had previously transferred to him, interfered with the confidential nature of the accountant-client relationship and with her resulting expectation of privacy in such transfer. In finding that no reasonable expectation of privacy existed in the transfer due to the anticipated disclosures by the accountant in the tax return, all the Court was saying was that, absent a greater measure of confidentiality between the taxpayer and her accountant, possession by the accountant even of papers owned by the accused was not tantamount to or an adequate substitute for possession by the accused herself, i.e., there was not a sufficient basis for a finding of "constructive possession." The Court's language did not comprehend the situation where the papers might be returned to Mrs. Couch's actual possession or control. Nor did the Court ever suggest that the Government could have summoned the documents in question directly from Mrs. Couch (assuming she had obtained their return prior to the issuance of the summons) simply by showing that the papers had previously been in the hands of her accountant who had used them in the preparation of her tax returns. Indeed, years earlier in the *Cohen* decision, the Government had conceded that records delivered by a taxpayer to an accountant for the accountant's use in preparing the taxpayer's tax return did not become unprivileged by virtue

of their use by the accountant and subsequent return to the taxpayer. See *United States v. Cohen, supra,* 388 F.2d at 471.

This case is very different from *Couch*. In *Couch*, the Court laid great emphasis on the absence of any personal compulsion against the accused. 409 U.S. at 329. In this case, on the other hand, the Government concedes that the attorney's possession is tantamount to possession by the Taxpayers themselves (Pet. Brief at 36) and makes no contention that by directing a summons to the Taxpayers' attorney, compulsion against the Taxpayers is avoided. Rather, the Government's position is that accountant's workpapers would be unprivileged even in the hands of the Taxpayers because they were unprivileged while in the possession of the accountant. The Government argues, relying on the above-mentioned language from *Couch*, that the subsequent transfer of the papers to the Taxpayers could not reconstitute the privilege because the Taxpayers lacked any legitimate expectation of privacy in the accountant's workpapers. With deference, we think the Government underestimates the constitutional importance of Taxpayers' constructive possession of the workpapers and misapplies the expectation of privacy rationale to the facts of this case.

To begin with, this Court has never suggested that the concept of privacy should replace or supercede the concept of personal compulsion in Fifth Amendment jurisprudence. If the accused is made the object of testimonial compulsion, he is not to be denied his privilege because he has not kept his thoughts or papers sufficiently confidential. If that were true, then all the Government would have to do to deny the accused

his privilege would be to show independent evidence of a prior oral statement or documentary disclosure by the accused to a third party. This would then permit the Government to force the accused to testify or produce evidence against himself. We submit that *Couch* cannot be read as permitting privacy concepts to displace the Fifth Amendment's primary function of shielding the accused against personal compulsion.[11] And surely it was never intended to be used to *authorize* such compulsion, as the Government contends here.

Taxpayers submit that if the summons to their attorney subjected them to personal compulsion, as the Government concedes, then the privilege is available irrespective of the degree of privacy attendant upon the prior use to which the workpapers were put. Any other rule invites endless inquiry into the prior custodial history of subpoened documents in order to determine whether an otherwise valid claim of privilege

[11]As the dissenting Judge in No. 74-18 stated:

> It is true *Couch* spoke of reasonable expectations of privacy, but it did so in a *fourth amendment* context solely with reference to whether the expectations of privacy accompanying the taxpayers' *transference of records* to his accountant were such that the taxpayer *retained constructive possession*. *Couch* did not suggest that expectations of privacy were relevant to the issue of whether "books and papers" are possessed rightfully in a purely personal capacity. Moreover, *Couch's* approval of *Cohen* supports this view. Lastly, it is far less evident to me, than the majority suggests without further elaborating, that there has been a " 'shift in emphasis from property to privacy' in the [Supreme] Court's treatment of the Fifth Amendment in compelled production of documents." If anything, *Couch* represents, in my view, a shift from ownership to possession. In any event, in the absence of a fourth amendment claim, it simply is not readily apparent to me how prior Supreme Court cases justify this engrafting of privacy principles onto the fifth amendment privilege which is a protection against personal compulsion (emphasis in original).

500 F.2d at 701.

should be denied on the grounds that sufficient secrecy had not been maintained either in the accused's treatment of the documents in his possession or in the treatment afforded them by his predecessors. Under such a rule an incriminating letter, for example, could be extracted directly from the accused simply by showing that it had been out of his possession at some prior point in time.[12] Under this same approach, documents could also be denied protection for not being sufficiently "confidential" or "intimate" in nature. Each judge would then be set adrift as to his own personal notion of "confidential" papers.[13]

[12]The proposed fact situation is not fanciful. See, e.g., *Hill v. Campbell and Wife*, Law Rep. 10 C.P. 222 (1875), where the English Court of Common Pleas had before it a case in which the claimant of the privilege had written an allegedly libelous letter to a Major Horrocks which had apparently induced the Major to fire a particular person as his servant or domestic. The servant thereafter sued the letter writer and her husband for libel, but was obliged to seek production of the letter from the letter writer herself since it had been returned to her at her request prior to the institution of the lawsuit. The letter writer thereupon opposed production of the letter on the ground that it might render her liable to a criminal prosecution. Although the Court denied the claim of self-incrimination since the claimant, after being requested by the Court to state in an affidavit how the letter might incriminate her, refused to make the affidavit, the Court made it clear that the privilege would have been available if a potential for self-incrimination had existed. "Upon that point," said the Court, "there is no doubt." 10 C.P. at 238. "[The respondent] cannot by the law of England be so compelled." *Id.*

[13]See, e.g., *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971) (Fairchild, J. dissenting):

> Assuming, however, that there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. *They appear to have been maintained for business and professional purposes, with the knowledge and assistance of employees,* and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claimed (emphasis added) 445 F.2d at 150.

There is no support in this Court's decisions for such a radical reinterpretation of the Fifth Amendment.

But even if it is determined that an expectation of privacy in papers is an independent prerequisite to invocation of the privilege over and above the requirement of personal compulsion (a position we do not believe to be correct) and not a complementary concept relevant primarily to the issue of "constructive possession," Taxpayers nonetheless contend that the privilege is applicable in this case. It is of no small importance that at the time the summons issued Taxpayers, through their attorney, were in constructive possession of the workpapers. The dominion and control which they rightfully exercised over the workpapers, together with their pre-existing personal interest in the information contained therein, gave Taxpayers a reasonable expectation of privacy in the workpapers *at the time their attorney was served with the summons.* As this Court held in *Couch,* the "rights and obligations of the parties become fixed when the summons was served." 409 U.S. 329, n. 9. At the time the summons was served, Taxpayers had actual dominion and control over the workpapers which they had brought within "the

Footnote 13 continued:

> The suggestion that business records which are open to view by employees or others are somehow outside the coverage of the privilege is, of course, contrary to this Court's holding only last term that "the privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life," *Bellis v. United States,* 417 U.S. at 87-88, and to more ancient authorities such as *Ballman v. Fagin,* 200 U.S. 186 (1906). The point is that this Court has never established a hierarchy of documentary evidence from the more to the less "private" based on the confidentiality with which the documents were maintained.

private enclave where [they] lead a private life." *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), quoting *United States v. Grunewald*, 233 F.2d 556, 581-582 (2d Cir. 1956), *reversed*, 353 U.S. 391 (1957). That was the time to test their expectation of privacy, not, as the Government argues, when Taxpayers gave their accountant the information necessary to prepare their tax returns.

Of what relevance, we ask, is the fact that an expectation of privacy may not have existed years earlier in 1970, 1971 and 1972 when presumably the workpapers for the 1969, 1970 and 1971 tax returns were prepared? Because the prerequisites for exercising a right were not present in the past, does not constitute a very convincing reason for denying the right in the present when the necessary conditions for its exercise have come into being. In other words, the mere fact that the Government could have obtained the accountant's workpapers in this case from the accountant when the papers were in his possession without invading the private enclave of the Taxpayers and without exerting personal compulsion upon them is no justification for invading that enclave now and exerting compulsion upon the Taxpayers in contravention of the purposes of the privilege. As the Fifth Circuit stated:

> When the taxpayer in the present case received the records from his accountant, the taxpayer's physical possession became the "private enclave" which the Fifth Amendment privilege was designed to protect. It makes no difference that the taxpayer could claim no legitimate expectation of privacy when the records were held by the accountant, for it has not been suggested that a taxpayer in possession of records can be compelled to produce them because they have previously been used in preparing his own income tax return. For Fifth Amendment purposes, that the government can summon the documents from the accountant does not mean that those same documents can be summoned from the taxpayer. As the Ninth Circuit put it, "that the government might obtain these documents without compelling [the taxpayer] to incriminate himself is hardly a justification for compelling [the taxpayer] to incriminate himself (*citations omitted*).

499 F.2d at 452.

The language in *Couch* concerning the taxpayer's expectation of privacy at the time she delivered her papers to her accountant is in no sense inconsistent with the foregoing language from the decision below, for in *Couch* the taxpayer's expectation of privacy at the time she delivered her papers to the accountant were no different from what they were at the time the summons was served. No pre-summons action on her part had manifested any change in her intentions or any desire to bring those records back into the private enclave where governmental intrusion would be excluded.

Here, on the other hand, the Taxpayers had manifested such an intention prior to the issuance of legal process, but the Government would have the Court find that the Taxpayers' expectation of privacy was irrevocably fixed or frozen years earlier when the need for constitutional protection was not even apparent. We perceive the terrible effectiveness with which such a test would deny the Fifth Amendment privilege to many who would otherwise be entitled to invoke it, but we confess that the logic and legal basis for the proposition escapes us.[14]

[14]The Government's expectation of privacy argument can also be analyzed as a problem of "waiver." Under this approach, the initial transmittal of information from a taxpayer to the accountant would

We must also reject the Government's *in terrorem* argument that allowing the Taxpayers' claim of privilege in this case would ill serve the policy behind the privilege by allowing those under suspicion of having committed criminal acts to indiscriminately gather up documentary information that might be used against them.[15] There will be time enough for this Court to

Footnote 14 continued:

waive for all time the taxpayer's right to withhold from the Government any documents embodying such information. However, the argument clearly fails to meet established standards for the waiver of constitutional rights. Any waiver of the privilege against self-incrimination must be a "knowing and intelligent" waiver. See *Miranda v. State of Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gardner v. Broderick*, 392 U.S. 273 (1968). To hold that the giving of information to an accountant waives the privilege with respect to such information even though the need to claim the privilege may be years in the future is clearly contrary to the concept of a "knowing and intelligent" waiver. But even if the transfer of information to an accountant could, by some alchemy, constitute a waiver of the privilege, then by the smae logic the subsequent acquisition of documents embodying that information ought to operate as an effective withdrawal of the waiver as to those documents. Cf. *Stevens v. Marks*, 383 U.S. 234, 243-144 (1966); *U.S. v. DeCastro, West & Chodorow, Inc.*, 75-2 CCH Fed. Tax. Rptr. ¶9535 (6th Cir. 1975), since the Government cannot have relied on the waiver to its detriment.

[15] As the Government states:

> It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris*, 221 U.S. 274, 279-280, "[t]he right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

Pet. Brief at 26. We would point out that the Government's reliance on dicta from *Matter of Harris*, 221 U.S. 274 (1911) is misplaced. *Matter of Harris, supra*, was a case in which an involuntary bankrupt was required to turn over his records to a receiver, despite a claim of self-incrimination. However, as this Court explained in *McCarthy v.*

consider the applicability of the Fifth Amendment to such a situation when an accused seeks to use his privilege to protect information with which he lacks any prior personal interest or connection. But that situation is not present in this case. These workpapers are not impersonal records unrelated to these Taxpayers. In fact, except for the element of ownership, this case presents the situation that would have been presented in *Couch* had Mrs. Couch obtained the return of her papers from her accountant prior to the issuance of process and the Government had been obliged to serve her or her attorney instead. We do not believe that in such circumstances the Government would have defeated her claim of privilege. Nor do we think the absence of ownership in this case should dictate a different result. These workpapers may not be the Taxpayers' "private papers" in a proprietary sense, but they are "private papers" in every other relevant respect and have none of the characteristics of "public papers." As the Ninth Circuit stated almost a decade ago in rejecting this very argument by the Government:

> But even if we were to accept the government's test,

Footnote 15 continued:

Arndstein, 266 U.S. 34, 41 (1924), *Matter of Harris* rests on the proposition that the privilege against self-incrimination relates to the "adjective law," i.e., to evidence and witnesses, and therefore the privilege does not prevent the true owner of property from obtaining its return. Since the bankruptcy petition in *Matter of Harris* operated to vest the receiver with title to the papers in question, the privilege, which is testimonial in nature, was not allowed to defeat the receiver's superior right of ownership. In this case, on the other hand, the Government's claim to the papers rests not on any claim to superior title, but solely on the adjectival claim to view the records for their evidentiary and testimonial content. *Matter of Harris* is, therefore, wholly inapplicable to this case. See *McCarthy v. Arndstein, supra*, 266 U.S. at 41.

> the claim of privilege would not be barred here. Though prepared by Berke . . . the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those Cohen might designate. To pretend that such papers did not in substance reflect matter personal and private to Cohen, and to treat such papers as a source of information "independent" of Cohen, would be to condone the very 'shifts and subterfuges' which the government calls upon us to condemn.

388 F.2d at 472.

For the reasons stated, the accountant's workpapers in this case should be held susceptible to a claim of privilege in the hands of the Taxpayers or their attorney.

IV.

THE TAXPAYERS' FIFTH AMENDMENT PRIVILEGE IN THE ACCOUNTANT'S WORKPAPERS WAS NOT LOST BY TRANSFERRING THE WORKPAPERS TO TAXPAYERS' ATTORNEY.

The Government's position in the Court of Appeals was that the transfer of the workpapers from the Taxpayers to their attorney precluded findings that: (1) the Taxpayers remained in "constructive possession" of the workpapers; (2) the Taxpayers had a legitimate expectation of privacy in workpapers in the hands of their attorney; and (3) "personal compulsion" was being exerted upon them (Government's Brief for the Appellees at 22-26). Before this Court, however, the Government has changed its position and no longer so contends. The Government now says:

> We agree with the Court below in No. 74-611 that the transfer of the accountant's workpapers to the attorney should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession.

Pet. Brief at 36. See also Pet. Brief at 36, n. 16. As in *Curcio v. United States*, 354 U.S. 118, 121 (1957), "there is substantial ground for the Government's concession."

In *Couch v. United States*, 409 U.S. 322 (1973), this Court acknowledged that actual possession of documents is *not* an essential prerequisite to assertion of the privilege against self-incrimination. As this Court stated:

> . . . situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

409 U.S. at 333.

Although this Court denied the privilege to the taxpayer in *Couch*, whose documents were in the hands of her accountant when the subpoena issued, this Court's acknowledgement that constructive possession was a viable approach to Fifth Amendment rights, 409 U.S. at 333, and this Court's reasons for denying the privilege to Mrs. Couch, both strongly indicate that possession by a taxpayer's attorney, rather than his accountant, would be deemed sufficient constructive possession by the taxpayer to warrant assertion of the privilege.

The crux of this Court's decision in *Couch* was its holding that there was "no legitimate expectation of privacy and no semblance of governmental compulsion against the person of

the accused," 409 U.S. at 336, in obtaining records from her accountant. In reaching that conclusion, this Court noted that no confidential accountant-client privilege exists under federal law and further observed that no legitimate expectation of privacy exists in the accountant-client relationship because the accountant in his preparation of tax returns is under statutory duties of full disclosure to the Government and may disclose or not disclose the contents of the documents in question in his sole discretion. 409 U.S. at 335.

The relationship between an attorney and his client is obviously very different and there is clearly every expectation of privacy in that relationship. An attorney-client privilege *is* recognized by federal cases, *United States v. Judson*, 322 F.2d 460, 462-463 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), and the attorney *is* under ethical as well as legal compulsions not to disclose his client's private affairs. (See Texas Code of Criminal Procedure, §38.10, and ABA Code of Professional Responsibility, EC4-4). Moreover, when an attorney receives papers after an investigation for criminal violations of the tax laws has begun, he stands in as adversarial a posture to the government as the client himself and, unlike the accountant who is merely preparing a tax return, the attorney owes the government no duty of disclosure. In short, it may be fairly stated that there probably exists in the law no relationship which has more legal protection from outside intrusion than the attorney-client relationship and which therefore commands as great an expectation of privacy. To deny the taxpayer his privilege against self-incrimination because he places his records in the custody of an attorney retained to defend him in the very matter under investigation would clearly do violence to the realities of that relationship. As Mr. Justice Marshall stated in *Couch* (dissenting opinion):

> A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, *but also because the ordinary expectation is that the lawyer will not further publicize what he has been given.*

409 U.S. at 350 (emphasis added). Accord, *United States v. Kasmir, supra*, 499 F.2d at 453. Cf. *United States v. Judson, supra*, 322 F.2d at 467.

The legitimate expectation of privacy that exists in the attorney-client relationship is not the only reason for distinguishing between an accountant and an attorney in ascertaining the scope of the privilege against self-incrimination. The transfer of records from the accused to his attorney when it occurs "in the course of an attorney-client relationship, *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917), discussed in *Remmer v. United States*, 205 F.2d 277, 285 (9th Cir. 1953), *reversed on other grounds*, 347 U.S. 827 (1954), is generally a transfer made in order to secure the informed advice of counsel on whether or not the accused should claim his privilege. See *United States v. Judson*, 322 F.2d 406 (9th Cir. 1963). As the Court stated in *Judson:*

> The very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs.

322 F.2d at 468.

The transfer of records to an attorney during the course of

his representation of a client is therefore a necessary adjunct of the privilege itself. Unless such a transfer can be made without penalty or price, the privilege may be lost. As this Court recently stated:

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.

Maness v. Meyers, 43 U.S.L.W. 4143, 4149 (January 15, 1975). See also *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). In order to avoid depriving an accused of the advice of counsel or unconstitutionally penalizing him for seeking legal advice,[16] the transfer of records to an attorney during the course of an attorney-client relationship must be free of any harmful consequences to the privilege. Otherwise, the opportunities to intelligently exercise the privilege will be greatly impaired and the accused will be put to an unconstitutional Hobson's choice between an administratively conferred right to consult with counsel on the one hand[17] and his constitutional right not to

[16]The concept of a "penalty" in connection with the exercise of the privilege has been defined as "the imposition of any sanction which makes assertion of the Fifth Amendment costly." *Spevak v. Klein*, 385 U.S. 511 (1967).

[17]See IRS News Release IR-949 (1969), CCH Fed. Tax Rptr. ¶6946; *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Cf. *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir. 1960).

incriminate himself on the other. To force the accused to make such a choice is constitutionally impermissible.[18]

Finally, unlike the issuance of process to an accountant, it cannot be said that a transfer of records from a taxpayer to his attorney, followed by the attorney's compelled production of the records, produces "no semblance of Governmental compulsion against the person of the accused." *Couch v. United States, supra*, 409 U.S. at 336. The relationship between the accused and the attorney retained to defend him in the matter under investigation is necessarily a unique one. For all important purposes, they act with respect to the Government as a single person. As the Ninth Circuit noted in quashing a subpoena directed to a taxpayer's attorney:

> The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. *But this argument ignores the realities of the relationship existing where B is A's attorney.* An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. *No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney.* He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. *The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry. United States v. Judson, supra*, 322 F.2d at 467 (emphasis added).

[18]*Gardner v. Broderick*, 392 U.S. 273, 277 (1968); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967); Cf. *Stevens v. Marks*, 383 U.S. 234, 243 (1966); *Frost Trucking Co. v. Railroad Comm'n. of State of California*, 271 U.S. 583, 593 (1926).

Permitting the Government to disrupt this identity of interest between attorney and client by making the transfer of records to the attorney the occasion for the loss of the privilege and not its preservation, does not free the accused from all governmental compulsion. Quite the contrary. By forcing an accused to surrender his right to consult with counsel, or else to consult with counsel only under the most adverse conditions where the records can never leave the physical possession of the client, the privilege holder's ability to effectively exercise his privilege is reduced and the governmental compulsion upon him is correspondingly increased. The compulsion is therefore not removed, but simply allowed to take a more subtle form. As the Ninth Circuit has stated in *United States v. Judson,* 322 F.2d 460, (9th Cir. 1963).

> If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer was not available to utter the magic words. In our judgment, the inherent power thus to *compel indirectly* an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power *to compel the same result directly.*

322 F.2d at 468 (emphasis added).

For the reasons stated, the Government's concession that the Taxpayers' rights should neither be enlarged nor decreased by the transfer to their attorney should be accepted, and their attorney's possession of the workpapers should be deemed sufficient constructive possession by the Taxpayers themselves to

permit invocation of their Fifth Amendment privilege.[19] Accord, *United States v. Judson, supra; Colton v. United States,* 306 F.2d 633, 639 (2d Cir. 1962), *cert. den.,* 371 U.S. 951 (1963); *United States v. Riland,* 364 F.Supp. 120, 122 (S.D.N.Y. 1973); *Hughes v. Foster, Lewis, Langley & Onion,* 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964) *govt's appeal dismissed,* December 16, 1965; *Application of House,* 144 F.Supp. 95 (N.D. Cal. 1956); *People v. Minkowitz,* 220 N.Y. 399, 115 N.E. 987 (1917); 8 Wigmore *Evidence,* (McNaughton Rev. 1961), §2307, pp. 593-595.

V.

THE ACCOUNTANT'S WORKPAPERS ARE TESTIMONIAL IN NATURE AND THEIR COMPELLED PRODUCTION WOULD INCRIMINATE THE TAXPAYERS

The Government argues that the production of the accountant's workpapers would not require the Taxpayers to make any self-incriminating disclosures of a testimonial or communicative nature relying on this Court's decision in *Schmerber v. California,* 384 U.S. 757 (1966) (Pet. Brief at 16, 34-35). In *Schmerber,* this Court was faced with the issue of whether the with-

[19]It should be noted that Taxpayers have never argued that their Fifth Amendment rights were created or enlarged by the transfer to their attorney, as the Government persists in suggesting (Pet. Brief at 38). Nor does the Government fairly characterize the Fifth Circuit's decision in this respect (Pet. Brief at 37-39). All Taxpayers have contended, and all the Fifth Circuit found, was that the unique characteristics of the attorney-client relationship, as described above, lend support to Taxpayers' position that they had a legitimate expectation of privacy in records which they had placed into the hands of their attorney, that the issuance of the summons to their attorney amounted to "personal compulsion" upon them, and that they remained in "constructive possession" of the transferred records even when such records were in the custody of counsel.

drawal of blood and admission in evidence of an analysis thereon violated the defendant's privilege against self-incrimination. In holding the analysis admissible, this Court established the principle that the privilege protects an accused from being compelled to provide evidence of a "testimonial or communicative" nature and that the withdrawal of blood and use of the analysis did not involve compulsion to these ends. 384 U.S. at 761.

Unlike the situation in *Schmerber*, the Government here is not seeking the accountant's workpapers in order to determine the physical properties of the paper, the ink or the accountant's handwriting. It is obvious that the Government has no interest in the *physical* qualities of the workpapers nor in obtaining *physical* evidence from them. Instead, the Government is seeking the accountant's workpapers for the *information* contained therein concerning the Taxpayers. Since the workpapers are clearly testimonial in character, this case is distinguishable on that ground not only from the *Schmerber* case, but also from *Warden v. Hayden*, 387 U.S. 294 (1967) (clothing), *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplars), and *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars).

The Government also argues that production of the workpapers in this case would not incriminate the Taxpayers because "In complying with the summons, the Taxpayers would not be authenticating the workpapers or testifying about them in any manner" (Pet. Brief at 34). The Government cites *United States v. White, supra*, 322 U.S. at 698, for the proposition

that the privilege "is designed to prevent the use of the legal process to force from the lips of the accused individual the evidence necessary to convict him or *to force him to produce and authenticate any personal documents or effects that might incriminate him*" (emphasis added by Government). The Government contends that since only the accountant can authenticate the workpapers, Taxpayer's production of the records would not be incriminating. Such production, it argues, would only be an admission by the Taxpayers that the workpapers were in their possession, a fact that is said to be already admitted and, in any event, not to be incriminating (Pet. Brief at 35).

The Government's argument must be rejected since it improperly limits the scope of the privilege to those situations where the act of production is itself testimonial. Taxpayers recognize that the protection afforded by the Fifth Amendment includes protection against the compelled production of books and records *in part* on the theory that the act of production "is itself a representation that the documents produced are those demanded by the subpoena" *Curcio v. United States*, 354 U.S. 118, 125 (1957). But this Court has never held that the testimonial character of the act of production is the *sole* rationale for applying the privilege to documentary evidence.

There is nothing in the Government's quotation from the *White* decision which establishes any such limitation. In fact, the quotation from *White* must be read in light of the Court's statement only a few sentences later that the privilege ". . . protects the individual from *any disclosure*, in the form of oral

testimony, documents or chattels, sought by legal process against him as a witness" 322 U.S. at 699 (emphasis added). Furthermore, there are other indications in decisions by this Court that application of the privilege to documents is not limited solely to those situations where the act of production will be incriminating.

In *Gouled v. United States*, 255 U.S. 298 (1921), for example, the Court had under consideration a case in which a search of the defendant's office had been made, followed by the seizure of his private papers. Since the authorities seized the papers in issue, no testimonial act of production by the accused was involved. Nonetheless, in holding the Fifth Amendment to have been violated, the Court stated:

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case *he is the unwilling source of the evidence*, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

255 U.S. at 306 (emphasis added). See also, ***Hill v. Philpott***, 445 F.2d 144 (7th Cir. 1971), *cert. den.*, 404 U.S. 991 (1971), cited in *Couch v. United States*, 409 U.S. 322, 330 (1973). But Cf. *United States v. Blank*, 459 F.2d 383 (6th Cir. 1972). Also see *United States v. Dionisio*, 410 U.S. 1, 7, n. 6 (1973), where this Court said: "But *Boyd* dealt with the compulsory production of private books and records, *testimonial sources*, a circumstance in which the 'Fourth and Fifth Amendments run almost into each other' 116 U.S. at 630, 6 S.Ct., at 532."

More recently, this Court has illustrated the inadequacy of

the theory that the Fifth Amendment protects documentary evidence *only* if the accused himself produces the records by recognizing the constitutional viability of "constructive possession." *Couch v. United States*, 409 U.S. 322 (1973). In *Couch*, petitioner had argued that "[i]f the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost" 409 U.S. at 333. If the Fifth Amendment privilege gave no protection to records apart from the act of production, as argued by the Government, then the Court in *Couch* could simply have responded that petitioner's fears were well-founded because, in the absence of physical possession, she was in no danger of making any testimonial disclosure that contravened the policies of the privilege. Instead, this Court stated:

> That is not, however, the import of today's decision. We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

409 U.S. at 333.

This concept of constructive possession necessarily recognizes the applicability of the Fifth Amendment to documentary evidence even where no act of production by the accused himself is required. Cf. *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *cert den.*, 352 U.S. 833 (1956). Indeed, Mr. Justice Brennan, concurring in the *Couch* case, made

explicit what was necessarily implicit in the majority's opinion concerning the scope of the privilege:

> In some of these instances, to be sure, the person claiming the privilege would not himself have been the subject of direct Government compulsion. And there is no doubt that the Fifth Amendment is concerned solely with compulsory self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. *If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government agents.* Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view, to incriminate himself within the meaning of the Fifth Amendment.

409 U.S. at 337, n * (emphasis added). *Couch* would therefore seem to support the theory that the accused cannot be made the unwilling "source" of testimonial documents held under his control and dominion with a legitimate expectation of privacy, even if some way can be found to obtain the documents without requiring their production by the accused himself. However, this does not appear to be the only rationale for sustaining application of the privilege in such circumstances. Since *Schmerber v. California,* 384 U.S. 757 (1966), a somewhat different and parallel approach to the coverage of the Fifth Amendment has begun to develop.

In *Schmerber,* the accused was totally passive, so no issue involving the communicative aspects of the act of producing

documents was at stake. Nonetheless, rather than emphasizing the role of the accused as the "source" of incriminating evidence, the Court focused on whether the communications in question were directly or indirectly the accused's own communications, irrespective of the form they might take, and whether they *related* to some communicative act or writing by the accused. Thus the Court stated in *Schmerber:*

> It is clear that the protection of the privilege reaches an accused's communications, *whatever form they might take,* and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

384 U.S. at 763-764 (emphasis added). Later in the same opinion, the Court observed:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony *nor evidence relating to some communicative act or writing by the petitioner,* it was not inadmissible on privilege grounds.

384 U.S. at 765 (emphasis added).

The theory that a writing may be within the protection of the privilege if it relates to some communicative act or statement by the accused received its most recent articulation in this Court's opinion in *United States v. Nobles,* 43 U.S.L.W. 4815, 4818 (June 23, 1975). In that case, the Government sought production of a defense investigator's interviews with third parties. When the defendant refused to produce the report as requested by the prosecution, the trial court refused to permit the investigator to testify. On appeal, the circuit court held that the lower court's ruling had infringed on the defendant's

Fifth Amendment privilege since he had a right not to produce the report and could not therefore be penalized for his refusal. In reversing the decision of the Court of Appeals insofar as it pertained to the Fifth Amendment ruling, this Court stated:

> Respondent did not prepare the report, and *there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator*. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communication from him.

43 U.S.L.W. at 4818 (emphasis added).

The foregoing cases indicate that at least two rationales for application of the Fifth Amendment to documentary evidence have developed in this Court's decisions in addition to the production theory suggested by the Government. The first and broader theory would protect all documentary evidence when sought for its testimonial content, irrespective of whether the accused physically produced it, so long as the accused was the "source" of such evidence in the sense that he had dominion and control over it at the time of its compelled disclosure. The second and narrower theory would look to the nature of the writings to see if they reflected or in any way related to prior communicative acts of the accused. If they did, their compelled disclosure would be forbidden. Presumably, however, if they did not relate to communications of the accused, but to information emanating from third parties, they would have to be produced.

Taxpayers contend that under either theory the workpapers in this case are constitutionally protected. Taxpayers were certainly the "source" of the documents in issue at the time the summons was served in the sense that Taxpayers had dominion and control over the workpapers while the papers were in the possession of their attorney, and their forced production would therefore compel Taxpayers to produce testimonial evidence against themselves. Taxpayers are also protected by the second theory since the workpapers relate to prior communicative acts of the Taxpayers, being based *entirely* on information which they gave to the accountant. The compelled disclosure of those prior communications at the present time would surely be as incriminating and testimonial in nature as testimony directly from the witness stand. In fact, the evidentiary significance of the workpapers lies in the fact that they are based on communications from the Taxpayers to the accountant. That is what gives them their evidentiary force and that is exactly why they should be constitutionally protected.

The Fifth Amendment looks at substance and not form. Its protection "is as broad as the mischief against which it seeks to guard," *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), and it protects *all* communications by the accused "whatever form they might take." *Schmerber v. United States, supra*, 384 U.S. at 765.

Taxpayers submit that without ever reaching the broader theory of whether all documentary evidence in the possession of or under the control or dominion of the accused can be summoned, the Court can and should rule that accountant's

workpapers are protected by the Fifth Amendment in the hands of the Taxpayers who furnished the accountant with the information in them. Such workpapers are in substance the prior communications of the Taxpayers, despite their present form. If their production is compelled now, such production extorts communications from them no less than present oral testimony It constitutes "inquisitional pressure or coercion against a potentially accused person, compelling [him] against [his] will to utter incriminating self-condemning words or produce incriminating documents . . ." *Couch v. United States, supra,* 409 U.S. at 329.

Surely the fact that the utterances contained in the workpapers were made in writing at a prior time is no excuse for requiring an accused to republish them now. If an accused writes on a piece of paper, "I killed Ivy Printer," and if during the investigation of the death of Ivy Printer the note is removed from the constructive possession of the accused without requiring any act of production or authentication on his part, could it justly be said that such confession was not "testimonial" in nature and was outside the protection of the privilege? We think not. See *State v. Kirchess,* 269 So.2d 16 (Fla. Ct. of App.). Nor do we think any different result should obtain because the testimonial items are communicated to a third person who writes them down. See *Wilson v. United States, supra.*

The workpapers in this case are based entirely on information communicated to the accountant by the Taxpayers. As such, they are testimonial communications of the Taxpayers

reduced to writing by another at a prior time, but which are now within the dominion and control of the Taxpayers. Requiring their republication at this time is therefore to exact a testimonial communication from the Taxpayers themselves in violation of their privilege.[20]

Finally, we note that even under the Government's own theory that production is itself a communicative act, production of the papers should be barred. Taxpayers' attorney holds the papers in this case for and on behalf of the Taxpayers. His production of the papers should therefore be deemed the testimonial act of his clients and protected by the privilege. Any other result will render the concept of constructive possession meaningless and will undo the Government's valid concession in this case that the transfer to the attorney "should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession" (Pet. Brief at 36). Obviously, when the workpapers were in the Taxpayers' physical possession prior to the transfer to the attorney, their act of production would have constituted a testimonial communication. Holding that the transfer to the attorney changes the result will adversely effect the attorney-client relationship as previously discussed.

For the reasons stated, the Government's argument that the compelled production of workpapers from the accused's attorney is not "testimonial" in nature must be rejected.

[20]The fact that the accountant may be able to authenticate the workpapers at subsequent legal proceedings does not, of course, justify the use of legal process to obtain them if their contents would incriminate the accused. The Fifth Amendment protects against the incriminating disclosure itself and not just its admissibility into evidence. *Maness v. Meyers,* 43 U.S.L.W. 4143, 4147 (Jan. 15, 1975).

VI.

TAXPAYERS' ATTORNEY HAS STANDING TO RAISE TAXPAYERS' CONSTITUTIONAL RIGHTS

The Government takes the position in its Brief that the Taxpayers' attorney may not invoke the privilege on behalf of his clients (Pet. Brief at 40). While this issue was not raised in the District Court until after the close of all evidence (A. 69), and the District Court made no finding in that respect (A. 77-78), the Fifth Circuit nonetheless considered the issue on appeal and rejected the Government's position. It held that "the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege" *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

The majority rule among the Circuits is that an attorney *does* have standing to raise a claim of self-incrimination on his clients' behalf when the attorney is served with summons, if his clients could themselves assert the privilege. *United States v. Judson*, 322 F.2d 460, 463-465 (9th Cir. 1963); *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962), *cert. den.*, 371 U.S. 951 (1963); *Brody v. United States*, 243 F.2d 378, 387, n. 5 (1st Cir. 1957), *cert. den.*, 354 U.S. 923 (1957).[21]

[21]See also, *Hughes v. Foster, Lewis, Langley & Onion*, 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964), *govt's appeal dismissed*, December 16, 1965; *Application of House*, 144 F.Supp. 95 (N.D. Calif. 1956); *People v. Meyers*, 35 Ill. 2d 311, 220 N.E. 2d 297 (1966); *Clifton v. Granger*, 53 N.W. 316 (Iowa 1892); 8 Wigmore, *Evidence*, §2270, p. 416 (McNaughton Rev. 1961); Contra, *United States v. Boccuto*, 175 F.Supp. 886 (D. N.Y. 1959), *appeal dismissed*, 274 F.2d 860.

But Cf. *Bouschor v. United States*, 316 F.2d 451, 458-459 (8th Cir. 1963); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961); and *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964), *cert. den.*, 377 U.S. 976 (1964).[22] In summary, the First, Second and Ninth Circuits all permit the attorney to assert his client's privilege in circumstances where the client himself could have asserted the privilege, while the Eighth and Sixth Circuits have taken a contrary position.

An initial question arises as to the soundness of the authorities supporting the Eighth and Sixth Circuits' position on standing. While the majority opinion in the Fifth Circuit's decision in *United States v. White*, 477 F.2d 757 (5th Cir. 1973), *aff'd. per curiam en banc*, 487 F.2d 1335, *cert. den.*, 419 U.S. 872 (1974), did not reach the question, Judge Ainsworth in his dissent noted, at footnote 4, that the Supreme Court cases relied on in *Bouschor v. United States, supra*, and *In re Fahey, supra*, did not really support the proposition that an attorney could not assert his client's Fifth Amendment privilege. In this regard, Judge Ainsworth observed that *Bouschor* and *Fahey:*

> "rely on dicta from Supreme Court cases where a mere agency relationship existed for the benefit of a public entity which had no Fifth Amendment privilege, such as in Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951); United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S.Ct.

[22]The Government also cites *Ziegler v. United States*, 174 F.2d 439, 447 (9th Cir 1949), *cert. den.*, 338 U.S. 822 (1949) (Pet. B rief at 41, n. 21), but that decision would seem to be overruled on this point by the Ninth Circuit's later decision in *Judson v. United States, supra.*

385 (1966); and Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906)."

477 F.2d at 766, n. 4.

The rationale of *Bouschor* and *Fahey* may also be questioned on the grounds that an attorney unlike other agents is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and his assertion of the privilege is tantamount to the client's appearance and assertion of the privilege. This is clearly the law with respect to assertion of the attorney-client privilege, *Ex Parte Lipscomb*, 239 S.W. 1101 (Tex. Sp. Ct. 1922), 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961), and Respondents have discovered no sound reason for distinguishing between the attorney-client privilege and the privilege against self-incrimination with respect to the attorney's standing to assert them on behalf of his client.

It is well established that the attorney-client privilege is also a "personal privilege" belonging to the client and not to the attorney.[23] The attorney, however, can assert the privilege on behalf of the client even when the client is not a party to the action in which the privilege arises. Furthermore, the attorney has the *duty* to assert the privilege for his client whenever it may be applicable. *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956). As said by the Texas Supreme Court in *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922):

> Where the attorney objects to testifying upon the ground of privilege, it is to be regarded as the objection of the client.

[23] *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922); 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961).

Examination of the policy behind the liberalized rule of standing applicable to the attorney-client privilege strongly supports the positions of the First, Second and Ninth Circuits in also allowing an attorney to raise his client's privilege against self-incrimination with respect to records placed in the attorney's possession. The purpose behind the attorney-client privilege has been stated to be as follows:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. 8 Wigmore, *Evidence*, §2291 (McNaughton Rev. 1961).

A standing rule which requires a client to be on call at all times to personally claim his attorney-client privilege would tend to inhibit freedom of consultation between an attorney and his client because of the ever present risk that an attorney could be called to testify about conversations with his client at a time when the client might not be available to personally attend and invoke his privilege.[24] This risk, the full scope of which can never be ascertained in advance, would necessarily inhibit the free flow of information between an attorney and his client.

The same policy considerations are equally applicable to the

[24] As the Court stated in *Judson:*

> If the government's position were sustained here . . . [T]he government's powers could then be utilized to compel disclosure . . . by the attorney *whenever the taxpayer were not available to utter the magic words* 322 F.2d at 468 (emphasis added).

assertion of the Fifth Amendment privilege where possession of records by an attorney is the necessary result of attorney-client consultations. In either case, a rule of standing which requires the client to personally assert his privilege will have an inhibiting effect on the ability of the attorney to consult freely with his client. Examination of books and records, particularly in an investigation of a criminal violation of the tax laws, is essential to effective legal representation. As the Court said in *United States v. Judson, supra:*

> The very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs *Judson, supra,* at 468.

If the *Bouschor* and *Fahey* rule of standing is adopted, prudent attorneys, knowing that they will not be able to be assured of the availability of their clients at some future date when they may be served with summons, will be forced to advise their clients to keep the tax records in their own possession at all times, and both attorney and client will be subjected to a significant inhibition in their freedom of consultation. This inhibition on the right to consult with counsel which has not been found justified in connection with the attorney-client privilege is equally unjustified as applied to the privilege against self-incrimination.[25]

The *Bouschor and Fahey* rule is also unnecessarily wasteful.

[25]Permitting an attorney to assert his client's rights, where not to do so could inhibit the attorney-client relationship, would not be to promulgate any unusual rule of law. It is not at all uncommon for relaxed rules of standing to be adopted where substantive rights would otherwise be adversely affected. See, e.g., *Simmons v. United States,* 390 U.S. 377, 390-394 (1968).

This is indicated by the fact that an adverse ruling on the standing issue in no way precludes the Taxpayers from raising their privilege in any criminal proceeding that may eventually be brought against them. *Donaldson v. United States,* 400 U.S. 517, 531 (1971); *United States v. Newman,* 441 F.2d 165, 174 (5th Cir. 1971). Thus, if adjudication on the claim of privilege is deferred,not for the sound reason that no protectable interest exists, compare *United States v. Newman, supra* (intervention denied), with *Stuart v. United States,* 416 F.2d 459, 463 (5th Cir. 1969) (intervention granted), but on the wholly artificial ground that an attorney has no standing to assert his client's claim of self-incrimination, then the Government will have succeeded only in postponing until trial the day of reckoning when the privilege *can* be asserted. Such a postponement is unnecessarily costly to all concerned, for if the claim of privilege is valid now, it will be valid then and postponing the day for determination of that issue only means that the Government's intervening investigation and expenditure of public funds is likely to be wasted since any evidence the Government gathers resulting from the enforcement of the summons will probably be suppressed at trial as fruit of the poison tree. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964); *Wong Sun v. United States,* 371 U.S. 471 (1963).[26] Moreover, the Taxpayers will have been subjected

[26]This is not, of course, to say that a motion to suppress at trial is an adequate substitute for the nondisclosure of the records at the outset and the quashing of the summons. It clearly is not. Where incriminating documents have not yet been produced " 'the cat' [is] not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Maness v. Meyers,* 43 U.S.L.W. 4143, 4148 (Jan. 15, 1975). Once the Government has the records, it can use them to develop evidence and

to a criminal investigation in the interim which the Government might otherwise have called off. So wasteful a procedure, grounded as it is in purely formalistic reasons, should not be condoned.

A rule of standing which denies the attorney the right to invoke his client's privilege to protect the client would also seem to be at odds with the principle that an attorney is his client's spokesman in court, for good or ill, and his statements, if made within the scope of his authority, are binding on the client. *Laird v. Air Carrier Engine Service,* 263 F.2d 948 (5th Cir. 1959). As the Fifth Circuit stated in the *Laird* case:

> An attorney has wide authority in the conduct of litigation. He is chosen to speak for the client in Court. When he speaks in Court, whether it be on a formal trial or in an informal pre-trial, he speaks for and as the client. Those statements or agreements which dispense with proof of facts are made with respect to the impending trial and until withdrawn are not merely evidence as in the case

Footnote 26 continued:

follow leads in innumerable ways too subtle to trace and so long as the Government is careful to also develop some plausible "independent source" for the evidence it actually introduces at trial, it can profit from its improper acts. The taxpayer can easily lose in his subsequent efforts to show that the evidence used against him had an illegal source. See, *Balistrieri v. United States,* 394 U.S. 985 (1969). While the suppression procedure is therefore entirely proper where no legal mechanism exists for stopping the disclosures in advance (e.g., where there are covert bugging activities or warrantless arrests) and suppression is the best remedy available under the circumstances, the availability of such a procedure at trial is no excuse for lending the Government the aid of the judiciary to enforce an unconstitutional disclosure in circumstances where the Courts have it within their power to prevent the abuse at the threshold.

> of an ordinary admission. They are absolutely binding. As long as they stand, they foreclose the matter altogether.

263 F.2d at 953.

The record in this case clearly establishes that Attorney Kasmir was acting within the scope of his authority. The Taxpayers executed an Internal Revenue Service form Power of Attorney to Attorney Kasmir (A. 87-88). In the verified Response to Order to Show Cause and Motion to Quash Summons, filed in the District Court, Attorney Kasmir stated that he had "been directed by his clients, the Taxpayers, to assert their rights and privileges under the Fifth Amendment to the Constitution of the United States" (A. 18). In sworn testimony before the District Court, Attorney Kasmir testified that he had been instructed by the Taxpayers to "assert any rights that he [the Taxpayers] might have to protect them" (A. 65). Furthermore, the Government has never challenged either the authority of Attorney Kasmir to represent the Taxpayers or the scope of his representation.

Under the circumstances, Attorney Kasmir should be allowed to assert his clients' constitutional privilege. Where an attorney's authority is such that his clients will be visited with any adverse consequences of his conduct or statements, it is contrary to fundamental principles of fairness to hold that they are not also entitled to enjoy the beneficial effects of that advocacy.

The rule that an attorney cannot assert his client's Fifth Amendment privilege should also be rejected because it is grounded in a matter of procedural convenience within the

complete control of the Government and elevates form over substance. It is a well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party himself, even though in fact the documents in question may be in the actual possession of his attorney.[27] The physical location of the documents is unimportant. Basically, the test is control.[28] So long as the attorney is subject to the direction and control of his client, the attorney must produce records in his possesion when the client is subpoenaed.[29] If the Government had served its summons upon the Taxpayers in this case once it learned that the papers it sought were in the possession of the Taxpayers' attorney, no issue of standing would now exist. In view of the Government's representations to this Court in the *Couch* case that in situations where the taxpayer "retains possession and control of the records, it ordinarily issues the summons to the taxpayer because it is the taxpayer who has dominion over the records and the authority to return the summons," *Couch v. United States, supra,* 409 U.S. 334, n. 18, we fail to understand what purpose was served by issuance of a summons to the Taxpayers' attorney in this case, except to interject into the enforcement proceeding a spurious standing issue that might improve the

[27] *In re Ruppert,* 309 F.2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware,* 11 F.R.D. 44 (S.D. N.Y. 1951). See also, *Drehle v. Fleming,* 274 N.E. 2d 53 (Ill. Sp. Ct. 1971); *Williams v. Consolidated Investors, Inc.,* 472 P.2d 248 (Kan. Sp. Ct. 1970); *Unger v. Los Angeles Transit Lines,* 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960).

[28] *Schwimmer v. United States,* 232 F.2d 855, 860 (8th Cir. 1956), *cert. den.,* 352 U.S. 833 (1956); *In re Rivera,* 79 F.Supp. 510 (S.D. N.Y. 1948); *Alma-Schuhfabrik AG v. Rosenthal,* 25 F.R.D. 100 (E.D. N.Y. 1960).

[29] See cases cited at footnote 27. Compare *In re National Public Utility Investing Corporation,* 79 F.2d 302 (2d Cir. 1935).

Government's legal position. Since the real parties in interest were the Taxpayers, the summons should have been served upon them rather than upon their attorney. The fact that the Government chose to serve the Taxpayers' attorney should not be allowed to impair the constitutional rights of the Taxpayers.

The sole policy reason cited by the Government for requiring the Taxpayers to assert their right in person is simply untenable. The Government argues, relying on *Hoffman v. United States,* 341 U.S. 479 (1951), that it must have the accused assert his privilege in person so that the court may inquire into the basis of the claim (Pet. Brief at 41). However, *Hoffman* was not a standing case, but dealt instead with the question of whether a substantial danger existed for self-incrimination if the accused answered the questions put to him. Moreover, *Hoffman* involved oral testimony, *not* documentary evidence.

In the instant case, the Fifth Circuit correctly observed that the "incriminating character of the materials sought here has never been put in issue" *United States v. Kasmir, supra,* 499 F.2d at 451, n. 4. The oral testimony of the accused could hardly be expected to shed light on the incriminating character of the papers.[30] But even if that were a genuine

[30] The simple fact is that there was nothing the Taxpayers could have added to the testimony of Mr. Candy (the accountant) or Mr. Kasmir or to the documentary evidence (e.g., the receipt) concerning either the question of ownership or possession. We are at a loss to understand what other testimony the Government seeks that would have been relevant to the disposition of this case. Furthermore, the Government's argument that there is a need to show that the papers are "private papers" is legally irrelevant. In *United States v. White,* 322 U.S. 694, 699

possibility, the Government was free to subpoena the Taxpayers and call them as witnesses in the case. It made no effort to do so, preferring to hide this objection from the court and opposing counsel until after the close of evidence in the case (A. 69).

In *Reisman v. Caplin*, 375 U.S. 440 (1964), this Court held that "third parties *might* intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene" (emphasis added). This Court has never *required* intervention. Thus, the Fifth Circuit was clearly correct when it held:

> While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure.

499 F.2d at 454.

Finally, if, despite the foregoing, this Court decides to *require* a formal intervention as the exclusive method whereby an accused may raise his constitutional defenses, that requirement should be applied prospectively only and this Court should reach the merits of this case and quash the summons to produce records, *conditioned* upon the Taxpayers' subsequent intervention in the District Court on remand within a stated period of time after judgment. Use of such a condi-

---

Footnote 30 continued:

(1944), this Court stated that "the papers and effects which the privilege protects must be private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added). This concept of "possession in a purely personal capacity" was re-emphasized in *Couch v. United States, supra*, 409 U.S. at 330, n. 10. In the proceedings below there was never any issue that Dr. Mason received and held the papers in this case in other than "a purely personal capacity."

tional decree is consistent with the mandate of Rule 1, F.R.C.P., directing federal courts "to secure the just, speedy and inexpensive determination of every action," see *United States Corp. v. Guillory*, 206 F.2d 49, 53 (5th Cir. 1953); *In re Roney*, 139 F.2d 175, 177 (7th Cir. 1944), *cert. den.*, 322 U.S. 753 (1944), and would avoid penalizing the Taxpayers herein for the unsettled state of the law and unnecessarily postponing the determination of the Taxpayers' rights.

CONCLUSION

The Government,through its able attorneys, has raised a veritable thicket of technicalities all designed to show the Court why these Taxpayers should be denied their Fifth Amendment privilege. What is somehow lost in the welter of legal arguments, however, is the fundamental importance of the Privilege itself to a free society and the liberal interpretation it is to be accorded. As this Court stated in the *Hoffman* case:

> The Fifth Amendment declares in part that "No person * * * shall be compelled in any Criminal Case to be a witness against himself." This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." (cases omitted) This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure.

341 U.S. at 485-486

Although almost a century old, we think the following words

from the *Boyd* case are more relevant than ever and provide, after all is said and done, the clearest and most concise answer to Petitioner's many objections:

> . . . illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

116 U.S. at 635.

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT E. GOODFRIEND
CYRIL D. KASMIR
EDWARD A. COPLEY
Attorneys for Respondents

APPENDIX A

ROSENBERG, KASMIR & WILLINGHAM
Attorneys and Counselors at Law
2300 Main Tower
1200 Main Street
DALLAS, TEXAS 75202
214/744-5511

June 18, 1975

The Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States of America, et al. v.
C. D. Kasmir and Jerry A. Candy;
Number 74-611

Dear Mr. Rodak:

On this date, I received a copy of the Brief for the Petitioners (Government) in the above entitled and numbered case. The Court granted the Petition for Writ of Certiorari on January 27, 1975. Therefore, under Rule 41 of the Supreme Court Rules, the Government's brief on the merits should have been filed on March 13, 1975. On March 13, 1975, the Court extended the time for the Government to file its brief on the merits to April 12, 1975. On April 10, 1975, the Court further extended the time for the Government to file its brief on the merits to April 19, 1975. On April 18, 1975, the Court further extended the time for the Government to file its brief on the merits to April 30, 1975.

It is my understanding that the Government was advised by

your office that there would be no additional extensions beyond April 30, 1975. In apparent disregard of Rule 41 of the Supreme Court Rules and without even requesting another extension, the Government's brief on the merits was not filed until June 16, 1975, more than three months beyond the original due date and more than six weeks beyond the extended due date.

The purpose of this letter is to inquire as to whether or not you intend to receive and accept the Government's brief on the merits in view of the foregoing.

In the event that you decide to receive and accept the Government's brief, I believe that we should be entitled to the same amount of time to prepare our brief as the Government has had to prepare its brief. Therefore, I respectfully request an extension of time to file our brief on the merits to October 20, 1975, that date being three months beyond the original due date of our brief.

Very truly yours,

Cyril David Kasmir

CDK/1n

CERTIFIED MAIL — NUMBER 809746
RETURN RECEIPT REQUESTED

cc: Honorable Robert H. Bork
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

CERTIFIED MAIL — NUMBER 809747
RETURN RECEIPT REQUESTED

Supreme Court, U. S.
FILED
OCT 28 1975
MICHAEL RODAK, JR., CLERK

No. 74-611

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

LAWRENCE G. WALLACE,
Deputy Solicitor General,

STUART A. SMITH,
Assistant to the Solicitor General,

ROBERT E. LINDSAY,
GARY R. ALLEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-611

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

---

1. Subsequent to the filing of our consolidated brief in this case and *Fisher* v. *United States*, No. 74-18, the Second Circuit in *United States* v. *Beattie*, No. 75-6041, decided August 18, 1975, petition for a writ of certiorari pending, No. 75-407, upheld the enforcement of an Internal Revenue summons in circumstances closely analogous to those presented here. In a comprehensive opinion by Judge Friendly, which we have reproduced for the convenience of the Court at Appendix, *infra*, pp. 1a-33a, the court in *Beattie*

held that the Fifth Amendment privilege could not be invoked as a bar to production of accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon the claimant's becoming aware that he was the subject of a tax investigation, the claimant instructed his accountant to hand over the papers to the claimant's attorney, who then turned them over to the claimant.

The Second Circuit's opinion in *Beattie* strongly supports the analysis set forth in our opening brief. As the court there recognized (Appendix, *infra*, pp. 7a-10a), this Court's decision in *Schmerber* v. *California*, 384 U.S. 757, which rejected the application of the privilege to an involuntary blood test, establishes that in cases involving the production of papers, the correct test is whether the state is seeking to compel incriminating "responses which are also communications" (384 U.S. at 764). Here, as in *Beattie*, production of the summoned workpapers[1] will not involve the taxpayer's admission of their genuineness, correctness or reliability, but only of his present possession of them, a fact which is itself not incriminating. In any subsequent criminal trial of the taxpayer, the prosecution's proof of the correctness of the facts contained in the workpapers will not require the testimony of the taxpayer, but only the testimony of the accountant, who has no privilege to refuse to give evidence incriminating his client. See *Couch* v. *United States*, 409 U.S. 322, 335, and cases cited therein.[2]

[1] Respondents argue (Br. 7) that the use of the term "workpapers" in the question presented in the petition for a writ of certiorari forecloses enforcement of the summons with respect to the other items sought, *i.e.*, copies of tax returns and correspondence between the taxpayers and his accountant. No such inference can be properly made. Both the petition (p. 5, n. 4) and our opening brief (p. 7, n. 2) specifically enumerate the items set forth in the summons, and it is clear in context that the term "workpapers" is used generically in the petition to encompass all of the summoned items.

Moreover, consistent with the discussion in our opening brief (pp. 22-23), the court in *Beattie* (Appendix, *infra*, pp. 11a-18a) emphasized the controlling significance of this Court's decisions holding that the Fifth Amendment does not bar compelled production of the records of a corporation, a union, or a partnership which tend to incriminate the possessor. See, *e.g.*, *Wilson* v. *United States*, 221 U.S. 361; *United States* v. *White*, 322 U.S. 694; *Bellis* v. *United States*, 417 U.S. 85.[3] The Second Circuit correctly

[2] The court in *Beattie* (Appendix, *infra*, pp. 27a-29a) correctly found no significance for present purposes in the reference in *Couch* v. *United States*, *supra*, 409 U.S. at 330 n. 12, to *United States* v. *Cohen*, 388 F.2d 464 (C.A. 9), relied upon by respondents (Br. 52-54). Like the Second Circuit, we believe *Cohen* to have been wrongly decided. See our opening brief at pp. 29-31.

[3] Contrary to respondents' assertions (see, *e.g.*, Br. 8, 9, 12, 22), we do not contend that the privilege is inapplicable because the taxpayer's accounting firm was a collective entity. Indeed, it appears that the accountant in *Fisher*, No. 74-18, was a single practitioner. The critical fact is that the documents in question belonged to the accountant and were not the private papers of the taxpayer. *Gouled* v. *United States*, 255 U.S. 298, 306, relied upon by respondents (Br. 17, 72) is

observed that the "central conception" of those decisions is that "neither possession nor ownership, within or without the corporate context, can transform someone else's documents into one's own for the purpose of asserting the privilege * * *" (Appendix, *infra*, p. 15a).[4] Although respondents (Br. 29-49)

---

distinguishable. There, the documents in question belonged to the defendant and could have been offered in evidence at a criminal trial without any further authentication. Moreover, the basic premise of *Gouled* that the state may not seize evidence simply for the purpose of proving crime has been overruled. See *Warden* v. *Hayden*, 387 U.S. 294, 304-309.

[4] Respondents' emphasis (Br. 57-58) on the private nature of the information in the accountant's papers does not establish the availability of the privilege. "The purpose of the relevant part of the Fifth Amendment is to prevent compelled self-incrimination, not to protect private information. Testimony demanded of a witness may be very private indeed, but unless it is incriminating and protected by the Amendment or unless protected by one of the evidentiary privileges, it must be disclosed" *Maness* v. *Meyers*, 419 U.S. 449, 473-474 (White, J., concurring).

Moreover, contrary to respondents' assertion (Br. 41-42), *United States* v. *Nobles*, No. 74-634, decided June 23, 1975, does not cast doubt upon the enforceability of the summons against them. There, the Court held that the report of an investigator, engaged by defense counsel to interview third parties who were called as witnesses at trial was not protected by the defendant's Fifth Amendment privilege. While the Court observed (slip op., p. 8) that the report did not contain any information conveyed by the defendant to the investigator, such disclosures would have been protected by the attorney-client privilege since the investigator was hired by defense counsel. Here, however, there is no claim that the accountant's records, compiled from information received from the taxpayer, were prepared under the supervision of counsel in connection with the taxpayer's defense to a criminal charge. *Nobles* therefore has no application here. Indeed, the Court's opinion in *Nobles* quoted with approval (slip op., p. 8, n. 7) the portion of Mr. Justice White's concurring opinion in *Maness* v. *Meyers* reproduced above.

attempt to distinguish these cases on the ground that the claimants were holding the records in a "representative" capacity, the argument is without merit. These references, as Judge Friendly noted (Appendix, *infra*, p. 17a)—

> were needed to explain how it was that an accused could be forced to produce incriminating records in his possession which in a real sense were very much his own; they afford no basis for an inference that because an accused is not acting in a representative capacity, he can extend the privilege to any incriminating papers or other objects he can manage to secure.

2. Although the Second Circuit in *Beattie* enforced the summons with respect to the accountant's workpapers, it declined to compel production of copies of any communications between the taxpayer and his accountant. See Appendix, *infra*, p. 31a. In its view, "[i]t would indeed be a crabbed reading of the privilege to hold that it applies to copies of letters written by an accused but not to letters written in response; the latter, if in the possession of the accused, are within the protected 'private inner sanctum' as much as the former * * *" (Appendix, *infra*, pp. 30a-31a).

We agree that such correspondence might well qualify for the privilege under *Boyd* v. *United States*, 116 U.S. 616, if they are sought from the taxpayer's

own files. In those circumstances, the original letters from the accountant to the taxpayer and copies of letters from the taxpayer to the accountant would be part of the taxpayer's private papers. But here, as in *Beattie*, the summons sought the correspondence from the accountant's files, which presumably contain original letters from the taxpayer to his accountant and copies of letters from the accountant to the taxpayer.

As this Court recognized in *Couch*, *supra*, 409 U.S. at 331, the accountant's copies of such correspondence are not subject to a claim of privilege by the taxpayer. Accordingly, we submit, there is no reason why production of the correspondence as well as the workpapers in the accountant's files should not be required of the taxpayer in the circumstances here. Pursuant to the Court's *Schmerber* analysis, the taxpayer would not be compelled to make any incriminating responses of a communicative nature in producing the correspondence appropriated from his accountant's files. His production would simply acknowledge that the correspondence was taken from his accountant's files and would not elicit from him any statement as to the correctness of any fact contained in those documents. As in the case of the workpapers, the evidentiary use of the correspondence summoned from the accountant's files would require only the testimony of the accountant which is not barred by the Fifth Amendment or any evidentiary privilege.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

STUART A. SMITH,
Assistant to the Solicitor General.

ROBERT E. LINDSAY,
GARY R. ALLEN,
Attorneys.

OCTOBER 1975.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1305—September Term, 1974.

(Argued July 17, 1975 Decided August 18, 1975.)

Docket No. 75-6041

UNITED STATES OF AMERICA and DONALD M. CERRA,
Special Agent of the Internal Revenue Service,
APPELLEES,

v.

JOHN L. BEATTIE, JR., APPELLANT.

Before:

MOORE, FRIENDLY and VAN GRAAFEILAND,
Circuit Judges.

SIDNEY R. RUBIN, Rochester, N.Y. (Rubin, Levey and Battaglia, Rochester, N.Y., of counsel), *for Appellant.*

ROBERT E. LINDSAY, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott

P. Crampton, Assistant Attorney General, Washington, D.C., Richard J. Arcara, United States Attorney for the Western District of New York, Buffalo, N.Y., Gilbert E. Andrews, Attorney, Tax Division, Department of Justice, Washington, D.C., of counsel), *for Appellees.*

FRIENDLY, *Circuit Judge*:

This is an appeal by John L. Beattie, Jr. (sometimes hereafter the taxpayer) from an order of the United States District Court for the Western District of New York pursuant to 26 U.S.C. § 7402(b) and § 7604(a), enforcing an Internal Revenue Service summons issued under 26 U.S.C. § 7602 despite Beattie's claim of self-incrimination.

The summons, dated September 13, 1974, required Beattie to appear before Special Agent Donald M. Cerra in Rochester, New York, and to bring with him and produce for examination:

> All original workpapers of Arthur Robeson, C.P.A. which are in your possession and were used in the preparation of Form 1040 U.S. Individual Income Tax Return of John L. Beattie Jr. and Margaret Beattie for the years 1968, 1969, 1970, 1971 and 1972 consisting of but not limited to the following: trial balances, balance sheets, adjusting entries, closing entries, workpapers, notes, memorandums and any correspondence used in the preparation of the aforementioned returns.

The petition for enforcement and an accompanying affidavit of Special Agent Cerra alleged that Beattie had appeared but had refused to produce the documents. It is not disputed that the principal purpose of Cerra's investigation was to determine whether to recommend that a criminal prosecution be initiated against Beattie with respect to his tax returns for 1968-72.

Beattie filed an answer and affidavits of his present attorney, of Robeson, and of himself. Beattie's affidavit stated that Cerra had informed him of the investigation or on about January 9, 1974, and had advised him of his constitutional rights to remain silent and to retain counsel. The affidavit went on to say that "On or about January 18, 1974, James W. Richards, Esq., acting as my attorney and on my behalf, and with my knowledge and consent, requested that my accountant, Arthur W. Robeson, deliver to Mr. Richards, for delivery to me, various work papers, trial balances, and schedules which Mr. Robeson had prepared as the accountant for me and for my business, Canteen Vending Company of Rochester, a sole proprietorship"; that on or about the same day attorney Richards had delivered the papers to Beattie; that the papers had been in his continuous possession thereafter; and that his refusal to produce them for the special agent's examination was based on the privilege against self-incrimination conferred by the Fifth Amendment to the Constitution. The accountant's affidavit confirmed that attorney Richards had requested delivery of "certain work pa-

pers which I had prepared for Mr. Beattie and said business" and had stated his intention to turn them over to Beattie. The accountant added that since Beattie "had paid me for my accounting services, including the preparation of these papers, I felt that he was entitled to have them if he so desired,"that the accountant had no need for the papers, and that accordingly he turned them over to attorney Richards.

The petition was orally argued. No one sought an evidentiary hearing, such as was held in *United States* v. *Fisher*, 500 F.2d 683 (3 Cir. 1974) (*en banc*), *cert. granted*, —— U.S. —— (1975), 43 U.S.L.W. 3416, and the court conducted none. After holding the matter for some months, apparently in anticipation of the Supreme Court's review of *Fisher* and a companion case,[1] the court entered an order overruling Beattie's claim of privilege, without further explanation, and enforcing the summons.[2] This court granted a stay pending an expedited appeal.

---

[1] See *United States* v. *Beattie*, Transcript of Proceedings, 16-19 (W.D. N.Y. 1/27/75).

[2] Although the summons and the petition speak of testimony on the part of Beattie, the briefs and argument have been concerned solely with production of the accountant's workpapers and this opinion is limited to the requirement that Beattie produce them. See 8 Wigmore, Evidence § 2259b at 357-59 (McNaughton rev. 1961). Specifically we express no opinion on the continued viability of the ruling in *United States* v. *Austin Bagley Co.*, 31 F.2d 229, 233-34 (2 Cir.), *cert. denied*, 279 U.S. 863 (1929), with respect to the obligation of a person in Beattie's position to identify papers he has produced. Compare *Curcio* v. *United States*, 354 U.S. 118, 123-25, 128 (1957), with *United States* v. *Fisher*, *supra*, 500 F.2d at 694 (concurring opinion of Judge Gibbons). We likewise express no opinion on whether the privilege would attach to photocopies of Beattie's own records, since we do not read the summons to include them.

The Supreme Court has granted certiorari to resolve the conflict between two other circuits involving a taxpayer's claim of privilege with respect to his accountant's workpapers, *United States* v. *Fisher*, 500 F.2d 683 (3 Cir. 1974) (*en banc*), denying the claim, and *United States* v. *Kasmir*, 499 F.2d 444 (5 Cir. 1974), sustaining it. However, in both those cases the taxpayer, after obtaining the workpapers from the accountant had transferred possession to his attorney, evidently believing although perhaps mistakenly, that two claims of privilege would be better than one. It is possible that the Court may dispose of the cases on the ground that, as in *Couch* v. *United States*, 409 U.S. 322 (1973), compulsory process did not run against the person claiming the privilege, without reaching the question whether the taxpayer could have sustained the claim of privilege if he had retained possession.[3] We therefore deem it best to render a decision so that the Supreme Court may have this variation before it when it decides *Fisher* and *Kasmir*.

---

[3] The Third Circuit seemingly doubted that he could, 500 F.2d at 691-92, and Judge Gibbons, concurring, clearly thought he could not, 500 F.2d at 693-94, whereas Judge Hunter, dissenting, thought the contrary, 500 F.2d at 695-97, as did the divided Fifth Circuit panel, 499 F.2d at 451-52.

I.

We speedily reject taxpayer's argument that *Couch* v. *United States*, *supra*, demands an almost automatic reversal. The holding in *Couch* was that the taxpayer's privilege did not attach even to his own records when these were in the possession of his accountant. It scarcely follows that the taxpayer's privilege does attach to the accountant's workpapers when these are in the possession of the taxpayer. The significance of *Couch* for the present case is in the language of the opinion, not in its holding.

We will be in a better position to evaluate this if we first review other decisions relating to the privilege and the considerations of policy that underly it.

We begin by noting that nothing turns on the fact that the self-incrimination clause of the Fifth Amendment provides that a person shall not "be compelled in any criminal case to be a witness against himself" whereas many state constitutions, including those of most of the original colonies, phrased the privilege in terms of compelling a person to give "evidence" against himself. *Schmerber* v. *California*, 384 U.S. 757, 761-62, n. 6 (1966), citing *Counselman* v. *Hitchcock*, 142 U.S. 547, 584-85 (1890) and 8 Wigmore, Evidence, § 2252 (McNaughton rev. 1961). However, recognition that the protection of the self-incrimination clause is not confined to the compulsion of oral testimony by the accused is still a considerable way from a conclusion that the clause protects against the production of evidence represent-

ing the statements of another person which are in the accused's possession. The *Schmerber* decision is an important datum against so much of taxpayer's argument as depends on a premise that the self-incrimination clause protects against compelling an accused to do anything that may assist the state in proving his guilt. As was there noted, "both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk or to make a particular gesture." 384 U.S. at 764. The Court went on to hold that the clause afforded no protection against requiring a defendant to allow his skin to be punctured so that the police could perform a blood test, as it was later to hold that the clause did not protect an accused from being forced to exhibit his person and use his voice. *United States* v. *Wade*, 388 U.S. 218, 221-23 (1967), or to give exemplars of his handwriting, *Gilbert* v. *California*, 388 U.S. 263, 265-67 (1967).

Recognizing that the enforced blood test sustained in *Schmerber* violated certain policies of the privilege against self-incrimination, Mr. Justice Brennan justified the decision on the ground that "the privilege has never been given the full scope which the values it helps to protect suggest. History and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge these values by obtaining the evi-

dence against an accused through 'the cruel, simple expedient of compelling it from his own mouth . . .' ", 384 U.S. at 762-63.[4] What "the protection of the privilege reaches" is "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers, *Boyd* v. *United States*, 116 U.S. 616." 384 U.S. at 763-64.

The test, then, in cases relating to the production of papers, is whether the state is seeking to compel incriminating "responses which are also communications." [5] A subpoena demanding that an accused produce his own records is taken to be the equivalent of requiring him to take the stand and admit their genuineness, see *Curcio* v. *United States*, 354 U.S. 118, 125 (1957); 8 Wigmore Evidence § 2264, at 380 (McNaughten rev. 1961).[6] While, as stated by

[4] The inner quote is from Chief Justice Warren's opinion for the Court in *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

[5] The *Schmerber* opinion made clear that this test is not satisfied by the fact that the object obtained from an accused would be used by the prosecution to secure the testimony of others, here testimony by the accountant with recollection refreshed by his workpapers. 384 U.S. at 761 n.5.

[6] We do not regard the statement in footnote 7 to the *Schmerber* opinion, 384 U.S. at 763, that the holding "is not to be understood as adopting the Wigmore formulation" that the privilege "was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt which would take the place of other evidence" citing 8 Wigmore, Evidence § 2263 (McNaughton rev. 1961) (emphasis in original) as inconsistent with this conclusion. We take the statement as a disclaimer of acceptance of any view, in-

Wigmore, "testimonial acts" of this sort (that is, the implicit assurance that the articles produced are the ones demanded) "are not typical of the sort of disclosures which are caught in the main current of history and sentiments giving vitality to the privilege," nevertheless "they are within the borders of its protection." 8 Evidence § 2264 at 380. A good reason for this is that if an accused is forced to produce his own papers, with the consequence that the prosecutor can put them in evidence without further

ferable from § 2263,, that the privilege applies only to compelled oral communications, not as a repudiation of the explanation in § 2264 that compelled production of an accused's own papers is within the privilege because of the authentication implicit therein. The Court had previously stressed the authentication factor in *United States* v. *White, infra*, 322 U.S. at 698, and in *Curcio* v. *United States, supra*, 354 U.S. at 125. It was to do so again in *Couch, supra*, 409 U.S. at 330-31; indeed Mr. Justice Marshall there stated unequivocally in dissent that the authentication "interpretation of *Boyd* has been accepted by this Court and by the leading commentators," citing *Curcio*, § 2264 of Wigmore, and McCormick, Evidence §§ 126-127 (2d ed. 1972), 409 U.S. at 346. Indeed, in the sentence immediately following the call to footnote 7, in *Schmerber* the Court said:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce *one's own papers. Boyd* v. *United States*, 116 U.S. 616. (emphasis supplied)

The correctness of Wigmore's formulation in § 2264 is also shown by the applicability of the privilege to the accused's compulsory production of chattels, which are not themselves communications and are relevant only circumstantially.

ado, he is in effect forced to take the stand if he wishes to dispute or explain them.

However, in order to bring a case of compelled production of papers within the privilege, the process must elicit not simply "responses which are also communications" but communicative responses tending to incriminate. It is here that the taxpayer's argument breaks down. By responding to the summons in this case, the taxpayer would not be admitting the genuineness, correctness or reliability of the accountant's work papers. He would be admitting only his present possession of them—a fact of no significance in a criminal trial for filing false returns for 1968-72. Whereas the prosecution could offer in evidence an accused's own records produced by him in response to process without further authentication, it can make no such use of an accountant's workpapers as proof of the facts therein recited without testimony by the accountant as to how he produced them, and the accountant has no privilege to refuse to give evidence incriminating his client. The prosecution cannot even prove that the taxpayer had seen the workpapers at the time of filling the returns without further testimony by someone. If the incriminating communication involved in producing one's own records lies only at the "borders of the privilege," as stated in 8 Wigmore, *supra*, at 380, the non-incriminating communication involved in producing another's papers would seem as a matter of principle, to fall outside them.

We think this to be the teaching of the Court's decisions in the only field where it has given extensive consideration to the issue whether compelled production of other people's papers by an accused is within the privilege. These are cases where an accused has possession of records of a corporation, a union, or a partnership which tend to incriminate him. It is settled that the possessor cannot refuse to produce such records even if the incriminating entries were made by himself, 8 Wigmore, Evidence § 2259b at 355-56 and n.2, although the implied communication made by the production is of far more assistance to the prosecution than any such communication to be made here.

It is worthwhile to review the three leading cases enunciating this principle. The first is *Wilson* v. *United States*, 221 U.S. 361 (1911). This dealt with a subpoena requiring United Wireless Telegraph Company to produce those letter-press copy books which contained copies of letters and telegrams signed by its president, C. C. Wilson, in regard to an alleged violation of federal statutes by him. Wilson, who had possession of the copy books, refused to produce them on the ground that the letters and telegrams might tend to incriminate him. The court, speaking through Mr. Justice Hughes, denied the claim of privilege. Citing *Boyd* v. *United States*, *supra*, 116 U.S. 616, and *Ballmann* v. *Fagin*, 200 U.S. 186, 195 (1906), for the proposition that the privilege protected Wilson "against the compulsory production of his *private* books and papers" (at 377, emphasis supplied), the

Court held that the privilege did not extend to Wilson's letters and telegrams which were corporate records, merely because Wilson had obtained lawful possession of them. The Court said, 221 U.S. at 380:

> But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd* case where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. (emphasis in original)

Relying on its decision in *Hale* v. *Henkel*, 201 U.S. 43, 74-75 (1906), that a corporation was not privileged from self-incrimination, the court went on to hold that, by acquiring possession of the books, Wilson could not prevent the company from complying with its duty of producing them.[7]

United States v. *White*, 322 U.S. 694 (1944), posed a similar question except that the records sought were those of a union which were in the possession of

[7] A companion case, *Dreier* v. *United States*, 221 U.S. 394 (1911), made clear that the *Wilson* decision did not depend on the fact that the subpoena was directed to the corporation: *Dreier* reached the same result where the subpoena was directed to the officer possessing the documents that were claimed to incriminate him.

White, an "assistant supervisor." The Court reversed a decision by a divided Third Circuit panel upholding a claim of privilege if White could prove he was a union member and thereby part owner of the union records. It said that the privilege was "designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce *and authenticate* any *personal* documents or effects that might incriminate him." 322 U.S. at 698 (emphasis supplied). It concluded, 322 U.S. at 704:

> Nor could respondent claim the privilege on behalf of himself as an officer of the union or as an individual. The documents he sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers. He thus could not object that the union's books and records might incriminate him as an officer or as an individual.

The rationale for these cases has been variously stated: sometimes it is said that the person has implicitly waived his privilege by assuming custodial responsibility [8] for the records of another entity, and this point is emphasized in the corporate context since the "visitorial" power of the state and hence the availability of corporate records, are well-established; sometimes it is said that where a group has a "su-

[8] See *Wilson*, *supra*, at 382; *White*, *supra*, at 699.

perior right"[9] of possession to documents, no other entity could claim a privilege barring the document's production since the government could compel the group to bring forth its papers and the group could do the same to the incriminated party.[10] Perhaps a

[9] See, e.g., the A.L.I. Model Code of Evidence, Rule 206:

> No person has a privilege under Rule 203 [self incrimination] to refuse to obey an order made by a court to produce . . . a document . . . under his control constituting, containing or disclosing matter incriminating to him if the judge finds that . . . some other person . . . has a superior right to the possession of thing ordered to be produced.

It is settled that one entitled to possession of a document can obtain if from a person possessing it even though the document would incriminate the possessor and that it may thereafter be used as evidence. *Matter of Harris*, 221 U.S. 274 (1911); *Johnson* v. *United States*, 228 U.S. 457 (1913).

[10] Wigmore finds both rationales wanting, and is characteristically pragmatic:

> Neither of these reasons will stand analysis. The first, based on waiver, begs the question. The custodian waives the privilege only because the cases beginning with Wilson v. United States have so held. . . . The second reason, based on a right to possession, is simply irrelevant. The sentiments which bar the *state* from requiring a person to deliver to it a self-incriminating document are logically unrelated to the fact that someone *else* . . . can require the person to deliver up the document to someone else.
>
> The reason why the privilege is not available to the custodian is that in this class of cases the arguments supporting efficiency of law enforcement are more persuasive, and the sentiments behind the privilege are less appealing, than in the usual case. . . . [E]conomic crimes . . . are usually not even *discoverable* without access to business records, [and thus] a rule which privileged the

mingling of these reasons is achieved by Justice Frankfurter's terse conclusion that "The Court's holding [in Wilson] boiled down to the proposition that 'what's not yours is not yours.'" *Shapiro* v. *United States*, 335 U.S. 1, 58 (1948) (Frankfurter, J., dissenting).

In our view it is this last notion—that neither possession nor ownership, within or without the corporate context, can transform someone else's documents into one's own for the purpose of asserting the privilege—which is the central conception of these cases. We are confirmed in this by the Supreme Court's most recent treatment of the subject, *Bellis* v. *United States*, 417 U.S. 85 (1974). This applied the *Wilson-White* principle to the records of a dissolved three-man law partnership. Bellis' secretary had doubled as the partnership bookkeeper under the direction of Bellis and the firm's accountant. When the partnership was dissolved, Bellis leaving to join a new firm, the records remained with the other two partners who continued as a new partnership. More than three years later, before issuance of a grand jury subpoena, Bellis had his secretary remove the records to his new office. The Court held that, despite the absence in *Bellis* of a retained "visitorial power" of the state over corporations or the special responsibilities of labor unions which had received

> production of such records whenever they incriminated the custodian would result in many (rather than few) of the violators going free.

We find no need to resort to this argument.

some emphasis in *Wilson* and in *White*, respectively, Bellis could not assert the self-incrimination privilege against producing the records. Quoting from *White*, Mr. Justice Marshall emphasized "the Court's consistent view that the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or *personal records*.'" [11] (Emphasis supplied.) Clearly the degree of incriminating "authentication" incident to Bellis' compelled production of records which had ben compiled under his supervision far outran anything here required of Beattie. The Court emphasized its recent tendency to place increased reliance on privacy as the prime rationale of the privilege, 417 U.S. at 91; it was largely because it could find no sufficient invasion of Bellis' privacy that it ruled as it did despite the abscence of the special principles relating to corporations and unions. There seems to us to be much less invasion of Beattie's privacy by compelling the production of Robeson's work product, of which Beattie obtained posses-

[11] The Court was confronted with a contention that the point argued by the Government in *Bellis* had already been decided against it in the *Boyd* case since the records there at issue were those of a partnership. Mr. Justice Marshall disposed of this, 417 U.S. at 95 n.2, on the ground that the point had not there been raised and that the *Boyd* Court had "decided the case on the premise that it involved the 'compulsory production of a man's private papers.'" 116 U.S. at 622. Mr. Justice Douglas, dissenting, "would treat a partnership as *Boyd* treated it." 417 U.S. at 103, and thought the Court was "effectively overruling Boyd . . .", 417 U.S. at 105.

sion only when a criminal tax investigation was in the offiing, than there was of Bellis' by making him produce records compiled by his secretary under his own supervision in the ordinary course of the business of a small partnership.

It is true that in the three cases under discussion the Court stated that the claimant of the privilege was holding the records in a "representative" capacity, whereas Beattie is not, and that much is made of the "organized, institutional activity" of which the holder is a representative.[12] But these references were needed to explain how it was that an accused could be forced to produce incriminating records in his possession which in a real sense were very much his own; they afford no basis for an inference that because an accused is not acting in a representative capacity, he can extend the privilege to any incriminating papers or other objects he can manage to secure. These cases where the privilege has been denied are regularly contrasted by the Court with those in which the claimant is holding his own records. To put the matter in a slightly different way, denying the privilege as to incriminating records even when prepared by the accused in the ordinary course of business on the ground that he was holding them in a representative capacity cannot be reconciled with sustaining the privilege with respect to other people's

[12] "Our conclusion is that it is the organizational character of the records and the representative aspect of petitioner's present possession of them which predominate over his belatedly discovered personal interest in them." *Bellis*, at 99-100.

papers of which an accused has acquired possession primarily for the purpose of withholding them from the Government. If anything, the latter is an *a fortiori* case for denial of the privilege. We do not think anything in *Bellis* really turned on the willingness of the other partners to make the records available to the grand jury, although this rendered "additional support" to the decision, 417 U.S. at 99, any more than it would matter here whether Robeson did or did not now wish to make his workpapers available to the IRS.

In sum, it is not readily apparent to us what telling distinction there is between a taxpayer's holding partnership records, of which he has obtained possession in order to thwart a criminal income tax investigation, and his holding papers of an independent contractor which he has obtained for the same purpose.[13] In order to determine whether the difference may have a significance we do not immediately perceive, we turn to the policies and the history of the privilege.

---

[13] Beattie makes some point that over a week elapsed before attorney Richards gained possession of the accountant's papers and eight months elapsed before the summons was served. We fail to see how the case stands differently than if Richards had acted on the day after the Special Agent had warned Beattie and the summons had been served the next day. There is no contention that the purpose was other than to put the workpapers within the range of the privilege as they would not have been if they had remained in the accountant's office, where some of them had reposed for nearly five years.

II.

The most comprehensive statement of the policies of the privilege was made in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964). We quote this, inserting numbers for convenient reference:

> It reflects many of our fundamental values and most noble aspirations: (1) our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; (2) our preference for an accusatorial rather than an inquisitorial system of criminal justice; (3) our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; (4) our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev., 1961), 317; (5) our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life." *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; (6) our distrust of self-deprecatory statements; (7) and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162.

The values of the first policy are evident enough when oral testimony is sought, the area where the

privilege began. As said in 8 Wigmore, Evidence § 2263 at 37879 (McNaughton rev. 1961):

> The history of the privilege—especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract* from the *person's own lips* an admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person a sworn communication of his knowledge of facts which would incriminate him. Such was the process of the ecclesiastical court, as opposed through two centuries—the inquisitorial method of putting the accused upon his oath in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath. (Citations omitted)

They have a diminished although a sufficient force when the state is seeking production of the accused's own records. But they become attenuated almost to the vanishing point when the state seeks production of another's records which are in the accused's possession.

Such a case is not truly one of self-accusation. While an accountant's workpapers may have an investigative value, they would rarely be admissible against an accused without testimony by someone, presumably the accountant, which the state is free

to compel. Indeed, a chief purpose of requiring production is to enable the accountant to testify more intelligibly, a purpose in no way offensive to the privilege, see note 5 supra. Perjury is not a real refuge as it is when the inquiry concerns something largely within the personal knowledge of the accused and the temptation to lie is encumbered mainly by conscience. Only a fool would deny the receipt of workpapers when the accountant would testify to their delivery; the temptation, as a practical matter, would thus be limited to a false claim of destruction or disappearance. But this possibility was present in equal degree in *Bellis*.

The second policy affords little help in deciding a particular case.[14] As was later to be demonstrated by Mr. Justice Brennan in *Schmerber*, *supra*, "our preference for an accusatorial rather than an inquisitorial system of criminal justice" has not led us to the logical position that the state cannot compel an accused to do anything that may contribute to his conviction. What can and what cannot be compelled must be decided in light of the language of the self-incrimination clause, its history, and the other policies suporting it.

The third policy is so manifestly inapplicable to court enforcement of a summons that no discussion is required.

---

[14] See the statement by Dean McKay, a strong defender of the privilege. "Language like this, no matter how often repeated, no matter how eloquently intoned, is merely restatement of the privilege itself," Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 209.

The fourth policy, like the second, comes within Mr. Justice Holmes' famous pronouncement, "General propositions do not decide concrete cases." *Lochner* v. *New York*, 198 U.S. 45, 77 (1905) (dissenting opinion). As shown by *Schmerber*, *Wade* and *Gilbert*, we do not in fact require "the government in its contest with the individual to shoulder the entire load." What is "a fair state-individual balance" is the very question at issue whenever a new problem of the extent of the privilege arises. It is hard to see why a balance that would have been fair if an accountant's workpapers had remained with him would become unfair simply because a taxpayer in anticipation of a criminal investigation has taken possession of them with the accountant's consent; the amount of assistance given the government is precisely the same.

Leaving the fifth policy for further discussion, we can speedily dispose of the sixth and seventh as here applied. Our "distrust of self-deprecatory statements" sounds in terms of the thumb-screw and the rack and their modern counterparts. If forced to produce the accountant's workpapers, Beattie will be making no statement other than the implied one that these are the papers of which attorney Richards obtained possession. This is scarcely "self-deprecatory"; indeed, as indicated above it has no evidentiary significance at all. It is equally difficult to see how making it harder for the accountant to testify accurately by referring to his workpapers can be "a protection to the innocent."

Apart from an exceedingly attenuated application of the first policy, Beattie's case must therefore rest on the fifth, the argument with respect to privacy. The Court's most recent statements on this are in *Couch* and *Bellis*. The Court stated in *Couch* that the privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation." 409 U.S. at 327. In *Bellis* the Court said that this inner sanctum "necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication." 417 U.S. at 91, and that "Protection of individual privacy was the major theme running through the Court's decision in *Boyd*, see *e.g.*, 116 U.S. at 630 . . .", 417 U.S. at 91.

Recognizing this, we fail to see how it assists Beattie. He had allowed, indeed invited, the accountant to prepare the workpapers and had permitted their retention by him for many years. Beattie's privacy would not have been impermissibly invaded if the Government had served the summons on Robeson before advising Beattie of the investigation. We fail to see why there is any greater invasion because the summons was served thereafter. The excerpts we have just quoted must be read in the light of such matters as that *Couch* related to the taxpayer's own books and records: that in a sentence immediately preceding his reference to the "private inner sanctum." Mr. Justice Powell had said, "By its very nature, the privilege is an intimate and personal one," 409 U.S. at 327; that *Bellis* excluded from the inner

sanctum the three-member law partnership records which Bellis had maintained: and, more generally, that in both cases decision went against the assertion of the privilege, not for it. The accountant's workpapers were within his inner sanctum and, if he were accused of aiding and abetting a tax fraud, he could successfully have claimed the privilege if he had kept them. But, as distinguished from Beattie's own records where a transfer of possession would be significant, the accountant's workpapers could not be brought within the taxpayer's "private inner sanctum". By their very nature, private inner sanctums are not transferable.[15]

III.

We approach the *Couch* opinion with all this in mind. Taxpayer derives small benefit from the sentence in text most heavily relied upon, 409 U.S. at 333:

> We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime.

This is little more than a statement of the holding, namely, that ownership of records will not support a

[15] Such sanctums exist by virtue of the relationships they protect, not the other way around. They do not constitute "free zones" around the person of the accused so that he may send out messages to retrieve incriminating documents or ask co-conspirators to hurry damaging materials into the hands of the most-likely-to-be-indicted.

claim of privilege if the incriminated owner is not the one compelled to produce them. The sentence surely does not mean that an accused can expand "the private inner sanctum of individual feeling and thought" by forays that will bring into his possession any incriminating material on which he can get his hands. Indeed Mr. Justice Powell was at pains to say, 409 U.S. at 336, n.20:

> We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court.

Neither do we find decisive in Beattie's favor the remarks, 409 U.S. at 331, that "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line" since

> It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter and conversations in which the accountant took notes, in addition to the accountant's own workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant.

This does not mean to us that the Court was ruling that an accountant's workpapers would be privileged if in the taxpayer's possession; it means only that the taxpayer's ownership of her business records did not allow her to claim any more privilege for them when they were in the accountant's possession than she could for the accountant's own workpapers. We

agree, of course, that what is material is not the ownership of the papers but their nature; we do not think it would matter whether Robeson passed title to Beattie or not.

Turning to the other side, while *Couch* obviously did not decide the question here at issue in the Government's favor we should not overlook passages in the opinion which point in that direction. The two most notable are, 409 U.S. at 335-36:

> Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

and, 409 U.S. at 336:

> It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to intefere with the legitimate interest of society in enforcement of its laws and collection of the revenues.

The taxpayer urges that however all this might stand if we looked only at the test of the *Couch* opinion, a decision in his favor is mandated by footnote 12. This was appended to a sentence commenting on Mrs. Couch's reliance on the *Boyd* case. Mr. Justice Powell first said that *Boyd* "did not, however,

address or contemplate the divergence of ownership and possession," citing in footnote the statement in *United States* v. *White, supra*, 322 U.S. at 699 that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." He then continued, "and petitioner concedes that court decisions applying *Boyd* have largely been in instances where possession and ownership conjoined, [citing in a footnote Brief for Petitioner 13-14] see, e.g., *Hill* v. *Philpott*, 445 F.2d 114 (CA 7, 1971); *United States* v. *Judson*, 322 F.2d 460, 63-3 USTC ¶ 9568 (CA 9 1963)". To this list was appended footnote 12, which reads:

> See also United States v. Cohen, 388 F2d 464, 468 (CA9 1967), where the court, in upholding the right of a possessor, nonowner, to assert the privilege, noted that "it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit." Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.
>
> We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege.

It is undisputed that *United States* v. *Cohen* is on all fours with this case and was decided in favor of the taxpayer.

We think the footnote, which came as part of a rejection of Mrs. Couch's argument and not of the Government's, was intended simply as another reaffirmation of the Court's position that ownership unaccompanied by possession was insufficient to trigger the privilege and was not a blanket endorsement of the Ninth Circuit's decision in *Cohen* contrary to the Court's later observation that it declined "to conjecture broad on the significance of possession in cases and circumstances not before this Court." 409 U.S. at 336 n.20. This conclusion is fortified by the apparent derivation of the footnote, which we outline in the margin,[16] and by the consideration that the Court

[16] Petitioner's brief in *Couch* had stated, pp. 13-14:

> The courts have frequently prevented the use of a man's own papers against him in a series of cases since Boyd v. U.S. (supra), although in most of these instances possession and ownership have remained simultaneous, for example, U.S. v. Cohen, 388 F.2d 464, 68-1 USTC 9140 (CA 9 1967), U.S. v. Judson, 63-2 UTSC 9658 (CA 9 1963) Hill v. Philpott, 445 F.2d 114, 71-1 USTC 9415 (CA 7 1971).

Unhappily this was riddled with error. In *Judson* there was ownership and not possession, and the decision is wrong in light of *Couch* unless it matters that in *Judson* the papers, although unprotected by the attorney-client privilege, 322 F.2d at 463, were in the possession of a lawyer rather than an accountant. In *Hill* v. *Philpott* there was a conjunction of ownership and possession; the question was not whether the records would have been protected against subpoena, as all conceded, but whether they were also protected against seizure pursuant to a search warrant. In contrast to *Judson* which involved ownership but not possession and ran counter to what was to be the holding in *Couch*, and *Hill* v. *Philpott* which involved both and was not truly relevant, *Cohen* involved possession but not ownership. Recognizing this, Mr. Justice Powell separated *Cohen* as the only one of the three cases that supported rejection of Mrs. Couch's contention that ownership alone was enough.

could hardly have meant to approve a decision on an issue important to the administration of the federal revenue laws which was not before it and which was contrary to decisions of other courts of appeals in cases not cited to it.[17]

We thus hold that an accountant's workpapers representing his independent work product, as distinguished from mere copies of a taxpayer's records, see note 2 supra, do not come within the privilege

[17] *Deck* v. *United States*, 339 F.2d 739 (D.C. Cir. 1964), cert. denied, 379 U.S. 967 (1965) (Prettyman, J.) (possibly although probably not distinguishable in that accountant had requested return of workpapers); *United States* v. *Widelski*, 452 F.2d 1 (6 Cir. 1971), cert. denied, 406 U.S. 918 (1972) (expressly declining to follow *Cohen*). In *United States* v. *Egenberg*, 443 F.2d 512 (3 Cir. 1971), where the court denied a claim of privilege by an accountant who was the subject of an investigation by special agents with respect to records of clients which were in his possession, the court, after saying that its conclusion was "not at variance with the holding of *United States* v. *Cohen*, 388 F.2d 464 (9 Cir. 1967), on which the district court relied," went on to state, 443 F.2d at 518:

> There is language in *Cohen* suggesting that mere possession of third party papers is enough to bring those papers within the witness' privilege. That language is inconsistent with the holdings of the Supreme Court and the reasoning of the opinion is unpersuasive.

There was no occasion for the Government to debate the correctness of *Cohen* or to cite the Court of Appeals decisions contrary to it since that issue was not before the Court in *Couch*.

simply because the taxpayer possesses them with the accountant's consent or even has acquired title to them. As Justice Holmes wrote, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story." *Matter of Harris*, 221 U.S. at 279-80, supra.

In so holding we have not overlooked that the paper held privileged in *Boyd* was not of the accused's own creation but was an invoice [18] from an English manufacturer covering the defendants' importation of plate glass. That fact indeed would destroy any theory that the privilege is limited to papers of the accused's own creation. But we are proceeding on no such theory. It would indeed be a crabbed reading of the privilege to hold that it applies to copies of letters written by an accused but not to letters written to him in response; the latter, if in the possession of the accused, are within the protected "private in-

[18] The Boyds had contracted with the United States government to supply imported plate glass subject to an exemption from duty. They claimed that they had met the contract out of inventory already on hand and were therefore entitled to a duty-free import of an equivalent amount. They had previously gained the free entry of 29 cases of plate glass and they contended that this shipment replaced only a part of that supplied to the government. The government asserted that the shipment had more than met the amount furnished. After the Boyds had secured another free entry permit for 35 cases of plate glass, and this shipment had arrived in America, but before its delivery, the goods were impounded and the permit revoked. In the proceedings for the forfeiture of the 35 cases, the government, pursuant to the statutory procedure held unconstitutional by the Court, sought production of the invoice for the first shipment of the 29 cases.

ner sanctum" as much as the former, see *Wilson* v. *United States*, *supra*, 221 U.S. at 378. Insofar as the summons requests copies of any communications between Beattie and Robeson, it should not be enforced, and we modify the order to so provide. But there is no such invasion of a private inner sanctum when a taxpayer is asked to produce the work product of an independent contractor, possession of which he has obtained in an effort to forestall the compulsory production the Government could have had if the contractor had retained them." [19] *Boyd* was not a case where buyer had persuaded a seller to turn over the seller's own records.

It is fundamental to the *Boyd* decision that by producing the invoice, the Boyds would have admitted the fact, crucial to their prosecution, that they had received it: indeed they were placed in a peculiarly uncomfortable position by the provision in the applicable statute, see 116 U.S. at 620, that "if the defendant or claimant shall fail or refuse to produce such book, record or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satis-

[19] In *Deck*, *supra* note 17, at 740, Judge Prettyman stressed that "[i]t was not until after the tax investigation began that [the taxpayer] showed any interest in the workpapers then in the possession of [the accountant] until [the taxpayer] requested them they were apparently regarded by all concerned as his property." This was quoted in *United States* v. *Zakutansky*, 401 F.2d 68 (7th Cir. 1968), cert. denied, 393 U.S. 1021.

faction of the court." Beattie is not being asked to admit anything by producing Robeson's workpapers except the fact, inconsequential to any prosecution, that he received them long after the income tax returns were filed. Another consideration, already noted, shows how widely the two cases differ. In order to impeach or explain the foreign invoice after its introduction into evidence, the Boyds would have had to testify themselves and abandon the right of silence, which the privilege confers. This would be the case also with a personal letter received from another. But documents and records compiled by third persons for their own use cannot be introduced unless the prosecution calls their author or some other witness who can authenticate and explain them. The privilege no more protects Beattie against such testimony than it would have protected the Boyds against testimony by the English seller.

V.

Little need be said of the taxpayer's only other argument, namely, that enforcement of the summons would violate IRS News Release IR-949 (1968), in which the Service announced that in a criminal noncustody investigation a taxpayer would be advised, *inter alia*, "that he cannot be compelled to incriminate himself by answering questions or producing documents. . . ." Not disputing that he was so advised, Beattie says the warning would be a hollow gesture if production of documents can in fact be

compelled. Apart from other questions concerning the effect of a violation of the News Release which need not detain us here, the short answer is that the warning was to be coterminous with the constitutional privilege. If, as we hold, compulsory production of the accountant's workpapers does not violate the privilege, it is not inconsistent with the warning.

The order enforcing the summons is affirmed, subject to the limitation set forth in this opinion. Since it seems likely that the taxpayer will desire to take the matter higher, we will extend the stay for fourteen days from the entry of this judgment and, if within that period, the taxpayer applies to the Supreme Court of the United States for a further stay pending a petition for certiorari, until the disposition of such an application.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 595477 83

MOTION FILED
AUG 15 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, ET AL., *Petitioners*

v.

C. D. KASMIR AND JERRY A. CANDY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS, AMICUS CURIAE

STANLEY H. STEARMAN
Attorney for Amicus Curiae
1717 Pennsylvania Ave., N.W.
Washington, D. C. 20006
(202) 298-9040

MARK A. GOLD,
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, ET AL., *Petitioners*

v.

C. D. KASMIR AND JERRY A. CANDY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Society of Public Accountants (NSPA) respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the National Society of Public Accountants arises from the relationship of *United States* v. *Kasmir,* 499 F. 2d 444 (5th Cir. 1974) to the previously decided case of *Couch* v. *United States,* 409 U.S.

322 (1973). The *Couch* Court found no Fifth Amendment privilege against compulsory self-incrimination for personal papers summoned by the Internal Revenue Service from taxpayer's accountant. Constructive possession, the Court said, was not present there because a legitimate expectation of privacy was absent.

The instant case and its companion are important offshoots of the *Couch* decision. They highlight the uncertainty injected into attorney-client-accountant relationships by the *Couch* holding. The Government relies heavily on *Couch* to support its conclusion that the *Kasmir* taxpayer is not entitled to the Fifth Amendment privilege. It is believed that the brief which amicus curiae is requesting permission to file will contain a more complete argument supporting the fiduciary nature of accountants who offer and perform tax return preparation services.

Additionally, amicus curiae hopes to shed some light on the nature of accountants' workpapers. The nature of such documents is essential to the "private paper" determination thought crucial by petitioner.

Respectfully submitted,

STANLEY H. STEARMAN
Counsel for Amicus Curiae
1717 Pennsylvania Ave., N.W.
Washington, D. C. 20006

BRIEF AMICUS CURIAE

INDEX

Page

Interest of Amicus 1

ARGUMENT:

I. The *Couch* Decision Should Be Reexamined Because of the Strained Effect It Has Had Upon Subsequent Fifth Amendment Decisional Law. 3

A. The *Couch Ratio Decidendi.* 3

B. Erroneously, the *Couch* Court Attaches Constitutional Significance to the Accountant's Disclosure Duty 4

C. The Accountant-Attorney Distinction Is Ill-Founded if Utilized to Ascertain a Legitimate Expectation of Privacy 10

II. The Fifth Amendment Privilege Against Compulsory Self-Incrimination Prohibits the Enforceability of Internal Revenue Summonses Seeking Production of Accountants' Workpapers Used in the Preparation of Tax Returns 18

A. Accountants' Workpapers Are Private Papers When in Taxpayers' Possession and Not Third-Party Records as the Petitioner Avers. 18

1. Petitioner's "possession of private papers" test 18

2. Petitioner's attempt to classify accountants' workpapers as third-party documents falls short 21

B. Petitioner's Emphasis on *Couch* Is an Additional Reason for Reexamination 26

Conclusion 27

Appendix A—National Society of Public Accountants Rules of Professional Conduct 1a

Appendix B—National Society of Public Accountants Rules of Professional Conduct for Members in Tax Practice 1b

INDEX OF CITATIONS

Page

CASES:

Bellis v. *United States*, 417 U.S. 85 (1974) 18, 20, 21, 23
Boyd v. *United States*, 116 U.S. 616 (1886) 17, 19, 20
Couch v. *United States*, 409 U.S. 322 (1973) ..... *passim*
Grant v. *United States*, 227 U.S. 74 (1913) 18, 20, 21, 22, 23
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 21
Murphy v. *Waterfront Comm'n*, 378 U.S. 52 (1964) .. 6
Schwimmer v. *United States* 232 F.2d 855 (8th Cir. 1956) 4
United States v. *Cohen*, 388 F.2d 464 (9th Cir. 1967) .. 24
United States v. *Fisher*, 500 F.2d 683 (3d Cir. 1974), *cert. granted*, 420 U.S. 906 (1975) 3, 4, 12, 18, 20
United States v. *Guterma*, 272 F.2d 344 (2d Cir. 1959) 4
United States v. *Kasmir*, 499 F.2d 444 (5th Cir. 1974), *cert. granted*, 420 U.S. 906 (1975) ..... *passim*
United States v. *White*, 322 U.S. 694 (1944) .. 19, 20, 21, 23
United States v. *White* 477 F.2d 757 (5th Cir. 1973) 4, 8, 12
Warden v. *Hayden*, 378 U.S. 294 (1967) 20
Wheeler v. *United States*, 226 U.S. 478 (1913) 18, 20, 21, 23
Wilson v. *United States*, 221 U.S. 361 (1911) ... 20, 24, 25

CONSTITUTIONAL, STATUTORY AND CODE OF FEDERAL REGULATIONS PROVISIONS:

U.S. Constitution, Fifth Amendment ..... *passim*
26 U.S.C. § 7206 (1) 7
26 U.S.C. § 7206 (2) 6, 7, 10, 11
26 U.S.C. § 7207 7
26 U.S.C. § 7602 ..... 2, 8
31 C.F.R. Subtitle A, Part 10 (United States Treasury Department Circular No. 230) 15, 16

MISCELLANEOUS SOURCES CITED:

American Bar Association Code of Professional Responsibility Canon 4 ..... 13, 16

American Bar Association Code of Professional Responsibility Ethical Consideration 4-4 13

American Institute of Certified Public Accountants Professional Ethics Rule 301 15

Page

National Society of Public Accountants Rule of Professional Conduct No. 1. ..... 13, 14, 16, 1a

National Society of Public Accountants Rules of Professional Conduct for Members in Tax Practice Nos. 6, 7, 10 and 16 ..... 13, 14, 16, 2b, 3b

Statement on Responsibilities in Tax Practice No. 6, Knowledge of Error: Return Preparation (New York: Division of Federal Taxation of the AICPA, August, 1970) pp. 4-5 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, ET AL., *Petitioners*

v.

C. D. KASMIR AND JERRY A. CANDY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS, AMICUS CURIAE

INTEREST OF AMICUS

The National Society of Public Accountants (NSPA) is a nationwide, non-profit professional society of more than 16,000 members. NSPA is dedicated, *inter alia,*

to promoting the highest standards of ethical conduct among accountants in public practice. NSPA further serves the accounting profession and general public by promoting and advocating equitable and constitutional statutory and case law at the state and federal levels. NSPA publishes and circulates the monthly magazine entitled THE NATIONAL PUBLIC ACCOUNTANT which is a highly regarded professional and technical journal.

During its thirty year existence, NSPA has been keenly aware of developments which affect the accountant-client relationship and the accountant-client-attorney relationship. Freedoms protected by the Fifth Amendment to the Constitution are of extraordinary importance to accountants in public practice.

At the accounting profession's core is the concept that the accountant is privy to all of a client's personal and private information which bears upon or relates to the scope of the engagement in question. The proper scope of the Fifth Amendment privilege against compulsory self-incrimination should encompass the realities of this historical fact, and take cognizance of the modern accountant-client relationships.

Amicus agrees with the petitioner in No. 74-611 that "[t]he issue raised in these cases is of major importance to the conduct of federal tax investigations by the Internal Revenue Service" (Pet. Br. 18). Questions arising from Fifth Amendment and Internal Revenue Code Section 7602 (administrative summons) situations concern all accountants in public practice who offer to clients tax counseling and tax return preparation services.

ARGUMENT

I. THE COUCH DECISION SHOULD BE REEXAMINED BECAUSE OF THE STRAINED EFFECT IT HAS HAD UPON SUBSEQUENT FIFTH AMENDMENT DECISIONAL LAW.

A. The Couch Ratio Decidendi

The accountant-client relationship is examined by this Court at length in *Couch* v. *United States,* 409 U.S. 322 (1973). *Couch* stands for the proposition that the Fifth Amendment freedom from personal, compulsory self-incrimination is to be measured by a possession or constructive possession yardstick:

> "*Couch* simply articulates that ownership of papers *per se* does not carry with it a vesting of the privilege against self-incrimination, that actual possession of documents bears the most significant relationship to Fifth Amendment protections . . . , and that there may be examples where constructive possession is so clear or relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." *United States* v. *Fisher,* 500 F. 2d 683, 691 (3d Cir. 1974), *cert. granted,* 420 U.S. 906 (1975).

Lack of actual possession,[1] the Court concedes, is not an absolute bar to invocation of an accused's Fifth

---

[1] The *Couch* ruling remains somewhat opaque. The majority vacillates when rebutting Mr. Justice Marshall's dissent:

> "We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids. Yet, contrary to any intimation in the dissent, we do not adopt any *per se* rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court." *Couch* v. *U.S.,* 409 U.S. 322, 336 n. 20 (1973).

Amendment rights.[2] Constructive possession becomes apparent when the onus of personal compulsion remains with the accused albeit dispossessed of the documents under scrutiny. *Couch* v. *United States, supra,* at 333; *accord, Schwimmer* v. *United States,* 232 F. 2d 855 (8th Cir. 1956); *United States* v. *Guterma,* 272 F. 2d 344 (2d Cir. 1959).

Constructive possession has, as its linchpin, an expectation of privacy which would, by necessity, accompany the transferred documents into the hands of the ultimate possessor. The issue is whether "the expectations of privacy accompanying the taxpayers' *transference of records*... [are] such that the taxpayer *retained constructive possession.*" *United States* v. *Fisher, supra,* at 701 (Hunter, J., concurring in part and dissenting in part). The taxpayer will be unable to seek Fifth Amendment protection "unless . . . [he] is actually in possession of documents. . . or clearly has constructive possession. . . because he will not be the object of any impermissible governmental compulsion." *United States* v. *White,* 477 F. 2d 757, 763 (5th Cir. 1973).

B. Erroneously, the Couch Court Attaches Constitutional Significance to the Accountant's Disclosure Duty.

Little comfort for the taxpayer who seeks a fair compromise between constitutional protections and In-

[2] Writing for the majority in *United States* v. *Kasmir,* 499 F. 2d 444, 448 (5th Cir. 1974), *cert. granted,* 420 U.S. 906 (1975), Judge Thornberry succinctly summarizes the *Couch* Court's view as follows:

> "But the Court was careful to note that 'actual possession' is not necessarily the *sine qua non* for successful assertion of the Fifth Amendment privilege . . . ."

ternal Revenue Service enforcement machinery is found in the Court's appraisal:

> "* * * [T]here can be little expectation of privacy where records are handed to an accountant, *knowing that mandatory disclosure of much of the information therein is required in an income tax return.* What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he willfully assists in the preparation of a false return. 26 U.S.C. § 7206 (2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. *Couch* v. *United States, supra,* at 335 (emphasis supplied).
>
> * * * *
>
> "The privilege cannot extend, however, to the protection of a taxpayer's records conveyed to a retained accountant for use in preparation of an income tax return, where the accountant is himself obligated to prepare a complete and lawful return. 26 U.S.C. § 7206 (2)." *Id.,* at 337-338 (Brennan, J., concurring).

By this reasoning, the Court finds no "expectation of protected privacy or confidentiality" upon the transfer by the taxpayer to the accountant of private financial records. *Id.,* at 336. Expectation of privacy is the telltale when extending the Fifth Amendment protection against governmental compulsion to non-possessory fact situations.

The *Couch* majority places signal emphasis upon the accountant's mandatory obligation to disclose informa-

tion which, theretofore, was of a private and personal nature, and had been within the "private enclave where [one] may lead a private life. . . ." *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55 (1964), quoting *United States* v. *Grunewald,* 233 F.2d 556, 581-582 (2d Cir. 1956) (Frank, J., dissenting), *rev'd* 353 U.S. 391 (1957). Jurists are hard-pressed to recognize an expectation of privacy when information is subject to mandatory disclosure. Admittedly, this is a persuasive statement on its face, but less dispositive when the accountant-client-attorney relationship is juxtaposed with the Internal Revenue Code.

Amicus concurs that the issue in "[i]ts most distilled form, . . . is whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession." *United States* v. *Kasmir,* 499 F. 2d 444, 451-452 (5th Cir. 1974). The *Couch* taxpayer was said to have no legitimate expectation of privacy in records given to an accountant for the purpose of preparing the taxpayer's personal income tax returns.

A "significant point" the Court says is the accountant's independent contractor status. *Couch* v. *United States, supra,* at 324, 334 n. 18. Presumably, Section 7206 (2) of the Internal Revenue Code of 1954, 26 U.S.C. 7206 (2) [3] creates for tax return preparers a

[3] Section 7206 (2) of the Internal Revenue Code of 1954, 26 U.S.C. 7206 (2), is as follows:

SECTION 7206 FRAUD AND FALSE STATEMENTS

Any person who—

(2) Aid or Assistance,—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . .

mandatory obligation to disclose to the Service all of a client's personal and confidential financial data within the preparers' possession. Yet, I.R.C. Section 7206(2) creates liability encompassing "any person" who aids or assists the preparation of a taxpayer's federal income tax return. "Any person" would necessarily bring independent contractor accountants, employee accountants, attorneys functioning as tax return preparers and commercial tax return preparers within the class susceptible to prosecution for violation of I.R.C. 7206(2). Notwithstanding the criminal prosecution risk for multiple parties, the Court finds constitutional significance only when the independent contractor accountant labors under such coercive influence.

The Internal Revenue Code places ultimate responsibility for information and factual disclosure upon the taxpayer himself.[4] Taxpayer and employee accountants are under no less a mandatory obligation to disclose supporting documentation than the retained independent public accountant. Nonetheless, the *Couch* Court is anxious to distinguish between accountants having like mandatory disclosure duties:

> "[H]is status is that of an independent contractor. He actually did 'very little work for the petitioner', had many other clients, and was compensated by the job.

[4] Sections 7206 (1) and 7207 of the Internal Revenue Code of 1954, 26 U.S.C. 7206 (1) and 7207.

'This is a *significant point.* The Government noted in oral argument:

'In the Internal Revenue Service practice, so long as the taxpayer has retained possession of the records and they are being used only by his full-time employees or others on the taxpayer's premises . . . we ordinarily . . . issue the summons to the taxpayer. . . . And if the taxpayer chooses to plead the privilege against self-incrimination, that is up to the taxpayer.' " *Couch* v. *United States, supra,* at 334 n. 18 (references omitted) (emphasis supplied).[5]

It would appear sheer casuistry to hold the mandatory disclosure obligation meaningless when records are in the taxpayer's possession or in his employee's possession; yet, critically important when the self-same records are in the hands of the taxpayer's independent contractor accountant. What legerdemain is this?

If amicus interprets *Couch, White* and *Kasmir* correctly, the privilege against compulsory self-incrimination could be invoked properly by the taxpayer to resist an I.R.C. Section 7602 summons issued to an employee accountant—even though the employee accountant is under the same statutory compulsion as the independent contractor accountant.[6] If the expectation of privacy is to be vitiated by the Internal Revenue Code mandatory disclosure duty, the accountant's employment status—whether independent contractor or ser-

[5] Petitioner in No. 74-611 agrees with the *Couch* Court and finds Fifth Amendment significance "between records prepared by the taxpayer's full-time employee . . . and records prepared by an outside accountant." (Pet. Br. 31 n. 15).

[6] This same conclusion would be reached if the Service tried to obtain the employee accountant's workpapers.

vant—should have no influence upon the constitutional issue at hand. Disclosure or nondisclosure should be identical for each.

Mr. Justice Douglas demonstrates the patent weakness of the mandatory disclosure test when used to quantify the expectation of privacy by stating:

> "The majority notes that 'the accountant himself worked neither in petitioner's office nor as her employee.' I cannot see how that factor bears on whether the 'ingredient of personal compulsion against the accused' is present, or whether the accountant was a confidant. The majority would seem to suggest, however, that petitioner, because her business did not call for, or because she could not afford, a full-time accountant, deserves less protection under the Fifth Amendment than a taxpayer more fortunately situated." *Couch* v. *United States, supra,* at 342 n. 4 (Douglas, J., dissenting).

If the mandatory disclosure obligation cannot penetrate taxpayers' "private inner sanctum," *Id.,* at 327, then the issue is, in actuality, a specious one having no relationship to the Fifth Amendment guarantee against compulsory self-incrimination. Internal Revenue Code mandatory disclosure, if applied as the *Couch* majority prescribes, results in an illogical application of the expectation of privacy test. The spurious nature of such a distinction is self-evident. Amicus submits that a taxpayer/client of an independent contractor accountant legitimately anticipates and expects the same degree of privacy from third party intrusion that his own employee/servant accountant affords him. Constructive possession, as measured by the expectation of privacy test, must be solidly based on something other than the absence of a mandatory disclosure duty test.

The Fifth Amendment freedom against compulsory self-incrimination is not lessened or abated when documents are transferred to an independent contractor accountant (accountant in public practice).

C. The Accountant-Attorney Distinction Is Ill-Founded if Utilized to Ascertain a Legitimate Expectation of Privacy.

Based upon *Couch,* the constructive possession issue may well rest upon artificial distinctions drawn between accountants and attorneys;[7]

> "Stripped of any constitutional perspective, the factual differences between this case [*Kasmir*] and *White* [*United States* v. *White,* 477 F.2d 757 (5th Cir. 1973)] may seem insignificant. . . . As a matter of constitutional law, we can see no other way to resolve the apparent dilemma in a manner which is consistent with the nature of the right against self-incrimination. . . ." *United States* v. *Kasmir, supra,* at 453.

Fellow professional brethren in the legal field fare much better when the legitimate expectation of privacy test is applied to determine constructive possession. Ill-founded indeed is the accountant-attorney distinction if the sole distinguishing factor is the mandatory disclosure language found at I.R.C. Section 7206 (2). As pointed out in Section I B, *supra,* taxpayer's employee accountant functions under the same liability language as does the independent contractor account-

[7] Couch has forced many sophisticated taxpayers to employ independent contractor accountants through an attorney. It is thought this ensures full Fifth Amendment protection to the taxpayer; for the accountant, as counsel's employee, is then an inextricable part of the attorney-client relationship.

Improvident taxpayers employ accountants directly and live with the uncertainty engendered by *Couch.*

ant; yet, the *Couch* Court goes to great lengths to preserve the Fifth Amendment privilege inviolate in this instance.

If the Court's logic is to be understood, an employee accountant and an attorney furnish the taxpayer with identical legitimate expectations of privacy.[8] The *Kasmir* Court highlights the very nature of the attorney's role. Based upon ethics and professional responsibility, in contradistinction to the accountant's duty to disclose, the attorney's role is said to justify an expectation of privacy:

> "[W]here the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, *the taxpayer's legitimate expectation of privacy with regard to the use of the materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns.* While the accountant has a legal duty to disclose, *the attorney has a strict, ethical obligation to prevent disclosure. The ethical obligation is broader than and independent of the attorney-client privilege, which is admittedly not available here.* The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association absolutely forbid an attorney from knowingly revealing either a 'confidence' or a 'secret' of his client. . . . *But even where there is no attorney-client privilege* in certain material . . . the taxpayer client may still have a legitimate ex-

[8] The Couch decision, in effect, states that a taxpayer can interpose the self-incrimination argument if his employee accountant possesses documents, but not if his independent contractor accountant has possession—even though I.R.C. 7206 (2) holds both accountants liable for non-disclosure.

> pectation with regard to that material because of the *attorney-client relationship,* an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention."[9] *United States* v. *Kasmir, supra,* at 453. (footnote omitted) (emphasis supplied).

Amicus submits the attorney-client "relationship" found to have constitutional significance in *Couch, White, Fisher* and *Kasmir* is akin and analogous to the "relationship" between an accountant and his client for purposes of income tax return preparation. Ethical and fiduciary responsibilities are as much an integral part of the accounting profession as the legal profession. Stripped of the specious mandatory disclosure argument and the attorney-client privilege—which is admittedly inapposite in this instance—, the attorney-accountant distinction is infinitesimal at best.

Mr. Justice Douglas soundly equates the attorney-client relationship with its accountant-client counterpart:

> "The majority contends, however, that petitioner cannot reasonably claim 'an expectation of protected privacy or confidentiality.' The reasons asserted for this position overlook the nature of the accountant-client relationship. The accountant, an agent for a specified purpose—i.e., completing the petitioner's tax returns—bore certain fiduciary

[9] The accountant-attorney distinction, is also noted in *Fisher:*

> "While standing alone it would be a slender reed, indeed, the court did make a comment in *Couch* which can be read to indicate a material difference between the accountant-client and the attorney-client relationship." *United States* v. *Fisher,* 500 F.2d 683, 697 n.9 (3d Cir. 1974) (Hunter, J., concurring in part and dissenting in part).

See also *United States* v. *White,* 477 F. 2d 757, 766 (5th Cir. 1973).

> responsibilities to petitioner. One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances, it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain. *Couch* v. *United States, supra,* at 340 (Douglas, J., dissenting).

Mr. Justice Marshall's statement "that, privileged or not, a disclosure to an accountant is rather close to disclosure to an attorney," *Id.,* at 351 (Marshall, J., dissenting), is also supported factually.

As indicated, *supra,* great emphasis is placed upon attorneys' adherence to the American Bar Association Code of Professional Responsibility—Canon 4 in particular.[10] Preservation of clients' "confidences" and "secrets" is also mandated by codes of ethics and professional conduct governing the practice of public accountancy and tax return preparation services. Two of the foremost professional accounting societies—the National Society of Public Accountants (NSPA), amicus curiae, and the American Institute of Certified Public Accountants (AICPA)—have promulgated and published codes of professional ethics every bit as stringent and demanding as ABA Canon 4.

NSPA Rule of Professional Conduct No. 1 and NSPA Rules of Professional Conduct for Members in

[10] ABA Canon 4: *A Lawyer Should Preserve the Confidences and Secrets of a Client.*

> Ethical Consideration (EC) 4-4 provides in part: "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

Tax Practice Nos. 6, 7, 10 and 16 read respectively as follows:[11]

> NSPA Rule of Professional Conduct No. 1-"A member shall not violate the confidential relationship between himself and his client or former client."
>
> NSPA Rules of Professional Conduct for Members in Tax Practice—
>
> No. 6 "In situations where the applicable law is unsettled, or where the application of the law to the facts at hand is uncertain, the member has a duty to explain the probable effects of the various alternatives to the taxpayer who must make the final decision as to the position to be taken.
>
> No. 7 "A member must not permit his client to treat an item having a bearing on his tax liability in a manner for which there is no reasonable basis in law or fact. Should the client insist upon the item being stated on the return incorrectly, the member should withdraw and refuse to prepare the return.
>
> No. 10 *"If the client will not permit sufficient disclosures to be made to properly calculate the tax due, then the member should withdraw from the assignment.*
>
> No. 16 *"A member has no obligation to communicate with the Internal Revenue Service with respect to a person whom he suspects has been grossly negligent or who may have committed fraud against the government."* (emphasis supplied).

[11] The National Society of Public Accountants Rules of Professional Conduct and Rules of Professional Conduct for Members in Tax Practice are reprinted as Appendices A and B, respectively, in this brief.

The AICPA takes a similar view by stating:

> "The CPA is neither obligated to inform the Internal Revenue Service nor may he do so without his client's permission. In appropriate cases, particularly where it appears that the Internal Revenue Service might assert the charge of fraud, the client should be advised to consult his attorney before taking any action." Statement on Responsibilities in Tax Practice No. 6, Knowledge of Error: Return Preparation (New York: Division of Federal Taxation of the AICPA, August, 1970) at 4-5.[12]

Tenuous, indeed, becomes the accountant-attorney "distinction" when we review the Treasury Department's attitude toward "mandatory disclosure." United States Treasury Department Circular No. 230, 31 CFR Subtitle A, Part 10, Sections 10.0-10.93, governs the practice of attorneys, certified public accountants and enrolled agents (public accountants) before the Internal Revenue Service. Accountant and attorney alike are subject to the regulations found at Sections 10.20 and 10.21 of Circular 230. Section 10.20(a) forbids an attorney, certified public accountant or enrolled agent (public accountant) from "[neglecting] or [refusing] promptly to submit records or information . . . *unless he believes in good faith and on reasonable grounds that such record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality.*" (emphasis supplied). Section 10.21 similarly indicates the Treasury

[12] AICPA Code of Professional Ethics Rule 301 is in full accord with the National Society of Public Accountants' promulgations:

> "*Confidential client information.* A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client."

Department's insistence upon a primary fiduciary responsibility to clients—not to the Department or the Internal Revenue Service as the *Couch* Court concludes. Section 10.21 reads, as follows:

> "*Knowledge of client's omission.* Each attorney, certified public accountant, or enrolled agent who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client is required by law to execute in connection with such matter, *shall advise the client promptly of the fact of such non-compliance, error, or omission.*" (emphasis supplied).

Treasury Circular 230, read in conjunction with the National Society of Public Accountants' and the American Institute of Certified Public Accountants' Codes of Ethics, weaves a formidable blanket of ethical and fiduciary restrictions for the accountant in public practice. ABA Canon 4 demands of attorneys no more than NSPA Rule of Professional Conduct No. 1 and NSPA Rules of Professional Conduct for Members in Tax Practice Nos. 6, 7, 10 and 16 demand of accountants in public practice.[13]

Amicus is concerned with the constitutional rights of taxpayer/ clients; the fulfilment of the public's reasonable belief and reliance upon the discretion and sanctity of the confidential and highly vulnerable personal data placed in the tax counselor's care is paramount.

---

[13] Indeed, one wonders whether a mandatory disclosure duty at all exists. See Section I B, *supra*. Amicus does not reach this question, but submits only that the mandatory disclosure onus, if any, is identical to attorneys and accountants.

Divergence of ownership and possession in financial documents is a fact of modern commercial practice. The Fifth Amendment must meet post-*Boyd*[14] situations where possession and ownership do not conjoin.[15]

For tax return preparation purposes, your amicus submits that the expectation of privacy necessary to ascertain constructive possession does, in fact, exist in client's papers and workpapers in the accountant's possession. Amicus strongly disagrees that the public has "little expectation of privacy" when retaining a professional accountant to aid in the filing of tax returns. The accountant-client relationship preserves Fifth Amendment guarantees for clients as does the attorney-client relationship. Taxpayers fully anticipate a reasonable likelihood of privacy free from governmental compulsion when confidential records are transferred to an accountant for tax return purposes. Both the profession and the public expect as much.

---

[14] *Boyd* v. *United States*, 116 U.S. 616 (1886).

[15] Mr. Justice Douglas comments upon the taxpayers' plight:

> "Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records . . . he must forgo such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination." *Couch* v. *United States, supra*, at 342 (Douglas, J., dissenting).

II. THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION PROHIBITS THE ENFORCEABILITY OF INTERNAL REVENUE SUMMONSES SEEKING PRODUCTION OF ACCOUNTANT'S WORKPAPERS USED IN THE PREPARATION OF TAX RETURNS.

A. Accountants' Workpapers Are Private Papers When in Taxpayers' Possession and Not Third-Party Records as the Petitioner Avers.

1. Petitioner's "possession of private papers" test.

Petitioner in No. 74-611 concedes that the ultimate disposition of the Fifth Amendment issue is predicated on "whether the taxpayer's initial possession of the accountant's workpapers was a sufficient basis for invoking the privilege" (Pet. Br. 17). Subsequent transfer to an attorney, petitioner claims, cannot infuse the taxpayer with any greater Fifth Amendment protection:

> "We agree with the court below . . . that the transfer of the accountant's workpapers to the attorney should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession" (Pet. Br. 36) (footnote omitted).

The taxpayer's initial possession, therefore, is the crux of the issue before the Court. Petitioner has engrafted *Wheeler,*[16] *Grant,*[17] and *Bellis*[18] onto *Couch* and views *Kasmir* and *Fisher* as a logical extension:

> "Indeed, the present cases would appear to follow *a fortiori* from *Wheeler* and *Grant* which held that even if the claimant could assert both a proprietary and a possessory interest in documents which are not his personal papers, such documents are not subject to a claim of the privilege" (Pet. Br. 26).

[16] *Wheeler* v. *United States,* 226 U.S. 478 (1913).

[17] *Grant* v. *United States,* 227 U.S. 74 (1913).

[18] *Bellis* v. *United States,* 417 U.S. 85 (1974).

Based on the line of cases mentioned, *supra,* petitioner fashions a formula which, if successfully met, justifies Fifth Amendment interposition:

> "[D]ecisions of this Court have established that the Fifth Amendment privilege against self-incrimination is not available to prevent the compulsory production of documents *unless they are the private papers of the claimant and are in his possession*" (Pet. Br. 19) (emphasis supplied).

Broken into components, petitioner's formula is (1) non-custodial (personal) possession or constructive possession of (2) personal records.[19] Petitioner alleges the *Kasmir* taxpayer failed in both areas. Accountants' workpapers, petitioner avers, "are not the client's private papers" therefore "the client has no greater right to withhold them from proper legal process than does . . . [a third party] possessor . . ." (Pet. Br. 15). To petitioner's thinking, the distinction between private papers and third-party records is central to the *Kasmir* appeal.

Analysis of the Fifth Amendment protection against compulsory self-incrimination begins with *Boyd* v. *United States,* 116 U.S. 616 (1886). In an oft-quoted statement, the Court noted that "any forcible and compulsory extortion of a man's own testimony or of his

[19] *United States* v. *White,* 322 U.S. 694 (1944), employs the terms "personal documents" (p. 698), "personal records" (p. 701), "private records" (p. 699) and "private papers" (p. 704). Petitioner in No. 74-611 also uses such terms interchangeably (Pet. Br. 22).

private papers to be used as evidence to convict him. . . . ," *Id.*, at 630 (emphasis supplied), violates the Fifth Amendment. Simultaneous ownership and possession afforded the *Boyd* Court a solid basis by which to ascertain a violation of claimant's privilege against self-incrimination.

Subsequent to *Boyd,* the Court has applied Fifth Amendment principles to situations in which ownership and possession did not conjoin, and documentary issues involved relationship to impersonal business entities. Generally, the Court has concluded that records of corporations, banks, unions and partnerships, to a certain degree, cannot be the subject of the personal privilege against self-incrimination albeit incriminatory to the custodian.[20] Reaching this conclusion, the Court has undergone a "shift in emphasis from property to privacy." *Warden* v. *Hayden,* 387 U.S. 294, 304 (1967); *United States* v. *Fisher, supra,* at 690. The Court, *Bellis* v. *United States,* 417 U.S. 85 (1974), highlights the "private enclave" which now defines Fifth Amendment parameters:

> "The Court's decisions holding the privilege inapplicable to the records of a collective entity also reflect a second, though obviously interrelated policy underlying the privilege, the protection of an individual's right to a 'private enclave where he may lead a private life' *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55 (1964). We have recognized that the Fifth Amendment 'respects a private inner sanctum of individual feeling and thought'—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication—and 'proscribes state intrusion to extract self-condemnation.' *Couch* v. *United States, supra,* at 327. See also *Griswold* v. *Connecticut,* 381 U.S. 479, 484 (1965)." *Bellis* v. *United States, supra,* at 91.

[20] For example, *Wheeler* v. *United States, supra, Grant* v. *United States, supra* and *Wilson* v. *United States,* 221 U.S. 361 (1911) involved records of corporate entities; *United States* v. *White, supra,* pertains to an unincorporated labor union and in *Bellis* v. *United States, supra,* the Court examined partnership records.

Sound is petitioner's conclusion that "the privilege 'should be limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records' (*United States* v. *White,* 322 U.S. 694, 701)" (Pet. Br. 13).

2. Petitioner's attempt to classify accountants' workpapers as third-party documents falls short.

Petitioner would have the Court equate personal financial records with records of a collective, impersonal entity to bring the instant case within the custodial possession cases (*Wheeler, Grant, White* and *Bellis*). The government states that the requisite personal or private character of the documents is absent, as it was in *White,* where the Court could ascertain "no element of personal privacy." *United States* v. *White,* 322 U.S. 694, 700 (1944). Accountants' workpapers, the government contends, are not the necessary personal, private papers which the Fifth Amendment protects from governmental compulsion. Petitioner flatly states accountants' workpapers are to be classed as "third-party records",[21] and not taxpayer's personal papers,

[21] Although petitioner does not proffer a clear definition of "third-party records", the government does say "if the claimant can assert neither possession nor ownership of papers, they are simply third-party records with respect to which the privilege is unavoidable" (Pet. Br. 21 n. 6).

therefore, not subject to a privilege claim. Petitioner maintains,

> "*Wheeler, Grant,* and *Bellis* establish that documents do not become 'private' or 'personal for Fifth Amendment purposes merely because the claimant physically possesses them, even if that possessior is under a claim of title. Here, the records at issue are accountants' workpapers which were created by the taxpayer's accountant in each case and were owned and maintained by the accountant until the commencement of the investigations. *They obviously were not private papers of the taxpayers and . . . did not become so upon being handed over by the accountants to the taxpayers . . .*" (Pet. Br. 23) (emphasis supplied).

Surely petitioner begs the issue. If petitioner is to have its way, workpapers are to be labelled as third-party documents pursuant to a *per se* determination notwithstanding the highly confidential and personal nature of the data contained therein. This cannot be the case; for financial data is clearly evidence to be protected by the Fifth Amendment.

Using *Grant* as authority, petitioner also asks the Court to examine the "essential character of the documents" (Pet. Br. 22) to determine if the papers are subject to the privilege. "With respect to documentary evidence there may be need for a factual determination whether the documents are the private papers of the claimant" (Pet. Br. 18).

Petitioner insists that "accountant's workpapers cannot be transferred into the private papers of his client" (Pet. Br. 30) (footnote omitted). No alchemy is involved here. We try merely to meet the govern-

ment's non-custodial possession of private documents test. Looking at the "essential nature" of the documents, as the government suggests, we ascertain that the accountants' workpapers involved in *Kasmir* are not the financial records of a separate entity (see *Bellis, Wheeler, Grant,* and *White*) but a reflection and compilation of taxpayers' own private financial affairs. This in itself is not important, says the government:

> "[W]orkpapers prepared by an outside accountant are not private papers of the client to whom they pertain. The mere fact that such records may reflect the taxpayer's financial transactions does not in itself create a Fifth Amendment privilege to bar disclosure" (Pet. Br. 31) (footnote omitted).

In light of petitioner's reliance on *Bellis,* this is a tenuous position.

Speaking for the majority, Mr. Justice Marshall views the Fifth Amendment privilege as having a clear application to "business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." *Bellis* v. *United States, supra,* at 87-88. This application is in contradistinction to "a substantial claim of privacy or confidentiality . . . with respect to the financial records of an organized collective entity" where "[c]ontrol of such records is generally strictly regulated by statute . . . and access to the records is generally guaranteed to others in the organization." *Bellis* v. *United States, supra,* at 92. The accountant's workpapers in *Kasmir* contain the requisite element of privacy and confidentiality essential to the privilege.

In *United States* v. *Cohen,* 388 F. 2d 464 (9th Cir. 1967), the relationship between an independent accountant and workpapers is aptly described:

> "Though prepared by . . . [the accountant] for use by him in the performance of his work, the work papers were scarcely public documents. They embody countless items of information relating to . . . purely personal affairs, including itemizations and summaries of data prepared directly from . . . bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those . . . [the taxpayer] might designate. To pretend that such papers did not in substance reflect matter personal and private . . . would be to condone the very 'shifts and subterfuges' which the government calls upon us to condemn." *Id.,* at 471-472.

The Court, *Wilson* v. *United States,* 221 U.S. 361 (1911), has never demanded that the claimant be the author or originator of documents to meet the "private documents" test:

> "It is at once apparent that the mere fact that the appellant wrote, or signed, the official letters copied into books, neither conditioned nor enlarged his privilege. *Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person. Id.,* at 378 (emphasis supplied).[22]

Petitioner's repeated claims that workpapers are not "private documents" contains a certain element of

[22] Petitioners concede the validity of the *Wilson* holding by stating: "Petitioners in No. 74-18 argue . . . that documents can be the private papers of the claimant even if they are written by another person. We do not contend to the contrary" (Pet. Br. 31 n. 15).

dubiety. Disclaimers of privacy along with challenges to examine the "essential nature" of the documents obfuscate petitioner's bare admission that the "essential nature" of workpapers is one of privacy and confidentiality. Petitioner's Brief at 31 note 15 contains the following language which is dispositive to the instant case:

> "However, for purposes of the Fifth Amendment, there is a difference between records prepared by the taxpayer's full-time employee with respect to which he does not relinquish possession and control in a non-privileged relationship and records prepared by an outside accountant."

By the above statement, petitioner patently admits the private nature of workpapers prepared by taxpayer's employee accountant, but does not find the same requisite element of privacy when workpapers containing identical private financial data are prepared by an independent accountant.

This is the very situation the Court sought to protect in *Wilson*—private information drafted or compiled by a third party. If *Wilson* is correctly applied in conjunction with petitioner's request to examine the nature of the documents, the distinction between employee accountant and independent accountant is meaningless for constitutional purposes. Once the nature of workpapers is ascertained to be "private documents", as petitioner so admits, the status of the original scrivener lends nothing to the analysis. Along this same vein, transfer type or duration would seem to be eliminated from the constitutional equation. Using petitioner's own formula, analysis must cease once personal possession of private documents is ascertained.

Amicus submits that the *Kasmir* fact situation more than meets the possession of private papers test.

B. Petitioner's Emphasis on Couch Is an Additional Reason for Reexamination.

Petitioner avers that *Couch* supports the long-standing rule of law that third-party records do not come within the Fifth Amendment for purposes of a privilege claim:

> "[T]he taxpayer could have claimed no privilege of self-incrimination in the accountant's workpapers had the summons been served while they were held by the accountant. *Couch* established that a taxpayer's own books and records are not protected when they are in the possession of an accountant, and it follows *a fortiori* that compelled production of accountant's workpapers . . . would not constitute 'extortion of information from the accused himself that offends our sense of justice' " (Pet. Br. 23-24) (citation omitted).

Section I, *supra,* discusses the difficulties engendered by the *Couch* holding. For reasons stated therein, amicus rejects any reliance petitioner may place upon the *Couch* rule of law. *Kasmir* should stand or fall on the personal possession of private papers argument without reference to *Couch* which should be reexamined independent of the present fact situation.

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

STANLEY H. STEARMAN
Attorney for Amicus
1717 Pennsylvania Ave., N.W.
Suite 1200
Washington, D.C. 20006

MARK A. GOLD,
of Counsel

ELMER F. HECKINGER, President
ALBERT R. VAN TIEGHEM, First Vice-President
W. R. LAMPLEY, JR., Second Vice-President
CHARLES H. EARP, Secretary-Treasurer
RUDOLPH J. PASSERO, Chairman
National Affairs Committee
JON C. BEDNERIK, Director of Government Affairs

August, 1975

APPENDIX A

APPENDIX A

National Society of Public Accountants Rules of Professional Conduct

RULE No. 1: CONFIDENTIALITY

A member shall not violate the confidential relationship between himself and his client or former client.

RULE No. 2: CONTINGENT FEES

Professional service shall not be rendered or offered for a fee which shall be contingent upon the finding or result of such service. This rule does not apply to cases involving federal, state, or other taxes, in which the findings are those of the tax authorities and not those of the member. Fees to be fixed by courts or other public authorities, which are therefore of an undetermined amount at the time the engagement is undertaken, are not regarded as contingent fees within the meaning of this rule.

RULE No. 3: INDEPENDENCE

A member or a firm of which he is a partner or shareholder shall not express an opinion on financial statements of an enterprise unless he and his firm are independent of such enterprise. Accordingly, a member shall not express an opinion on financial statements of an enterprise financed in whole, or in part, by public distribution of securities or on financial statements for use as a basis of credit if he or a member of his immediate family owns or is committed to acquire a substantial financial interest in the enterprise, or during the period covered by the examination he has been a director, officer or employee of the enterprise unless such interest or relationship is disclosed in the report.

RULE No. 4: USE OF FIRM NAME

A member shall not allow any person to practice in his corporate, partnership or individual name who is not a

partner, professional corporation co-shareholder or in his employ.

Rule No. 5: Conflict of Interest

A member shall not engage simultaneously in any business or occupation with that of the practice of public accounting, which is incompatible or inconsistent therewith.

Any business relationship which compromises a member's independence, integrity or professional standing violates this Rule.

Rule No. 6: Financial Statements

In expressing an opinion on representations in financial statements which he has examined, a member shall:

(a) Acquire sufficient information to warrant the expression of an opinion, or if his exceptions are sufficiently material to negate the expression of an opinion, he shall clearly disclaim an opinion; and

(b) Disclose any material fact known to him, the disclosure of which is necessary to make financial statements not misleading; and

(c) Report any material misstatement known to him to appear in the financial statement; and

(d) Direct attention to any material departure from generally accepted auditing procedures applicable in the circumstances.

Rule No. 7: Responsibility For Work

A member shall not sign a report purporting to express his opinion as the result of an examination of financial statements, unless they have been examined by him, or by a member or employee of his firm.

Rule No. 8: Forecasts

A member shall not permit his name to be used in conjunction with any special purpose statement prepared for his clients that anticipates results of future operation, unless he discloses the source of the information used and what assumptions he has made, and unless he indicates he does not vouch for the accuracy of the forecast.

Rule No. 9: Commissions

A member shall not pay a commission to obtain a client, nor shall he accept a commission for a referral to a client of products or services of others. This Rule shall not prohibit payments for the purchase of an accounting practice or retirement payments to individuals formerly engaged in the practice of public accounting or payments to their heirs or estates.

Rule No. 10: Solicitation

A member shall not directly or indirectly solicit clients, or encroach upon the practice of another accountant in public practice, but it is his right to give proper service and advice to those asking for such service and advice.

Rule No. 11: Advertising

A member shall not advertise his professional attainments or services.

Rule No. 12: Firm Names

A member in practice as an individual shall not use a firm name or plural term as "and company" or "and associates" or any other designation indicating anything other than individual ownership.

RULE No. 13: PROFESSIONAL REFERRALS

A member who receives an engagement for services by referral from another accountant shall not discuss or accept an extension of his services beyond the specific engagement without first consulting with the referring accountant.

RULE No. 14: CRITICISM

A member shall not, without making a proper investigation to determine that the criticism is warranted, criticize another accountant in the presence of anyone other than the accountant being criticized.

RULE No. 15: OFFER OF EMPLOYMENT

Direct or indirect offer of employment shall not be made by a member to any employee of another accountant in public practice without first informing such accountant. A member may negotiate with anyone who of his own initiative or in response to public advertisement shall apply for employment.

APPENDIX B

APPENDIX B

National Society of Public Accountants Rules of Professional Conduct for Members in Tax Practice

RULE No. 1

All tax returns prepared by a member or an employee should be signed with the firm name by the member himself, a member of the firm, or a member of his staff.

RULE No. 2

An unenrolled member must be ever mindful of the nature of the representation which may be required to fully protect a taxpayer's interests, and in appropriate cases should recommend that he consult an enrolled agent, an attorney, or a person admitted to practice before the Tax Court.

RULE No. 3

A member is not considered to be expressing an opinion on the representation in any financial statements required as a part of a tax return prepared and signed by himself, or a member or employee of his firm.

RULE No. 4

The responsibility of a member to review advice previously given, and tax returns previously prepared and filed, depends upon the nature of the contract between him and his client.

RULE No. 5

A member should have a clear understanding with his client, as to whether his responsibility ends with the preparation of a tax return, or other service based upon current law, or whether he is expected to inform his client of subsequent developments of the law which may materially affect the tax return as prepared, or the advice given.

RULE No. 6

In situations where the applicable law is unsettled, or where the application of the law to the facts at hand is uncertain, the member has a duty to explain the probable effects of the various alternatives to the taxpayer who must make the final decision as to the position to be taken.

RULE No. 7

A member must not permit his client to treat an item having a bearing on his tax liability in a manner for which there is no reasonable basis in law or fact. Should the client insist upon the item being stated on the return incorrectly, the member should withdraw and refuse to prepare the return.

RULE No. 8

A member is under duty to resolve all doubts in favor of his client when there is a reasonable basis in law and fact for the position taken and the client is advised of the alternatives and the probable effects thereof.

RULE No. 9

It is not incompatible for a tax practitioner to give a client tax advice, prepare his tax return, act as his advocate in tax controversies with Internal Revenue Service, and express a professional opinion on the fairness of the presentation in a balance sheet which includes the income tax liability, provided he is qualified under state law to do so, and is an enrolled agent.

RULE No. 10

If the client will not permit sufficient disclosures to be made to properly calculate the tax due, then the member should withdraw from the assignment.

RULE No. 11

A member is under duty to comply with all rules and regulations of the Treasury Department governing practice before the Internal Revenue Service.

RULE No. 12

A member should be considerate and respectful in dealing with representatives of the Internal Revenue Service.

RULE No. 13

An enrolled member should not make improper use of his Treasury Card.

RULE No. 14

A member should avoid the appearance of an unduly close relationship with representatives of the Internal Revenue Service.

RULE No. 15

A member should not further by any means unauthorized practice by others.

RULE No. 16

A member has no obligation to communicate with the Internal Revenue Service with respect to a person whom he suspects has been grossly negligent or who may have committed fraud against the government.

RULE No. 17

In preparing an unaudited tax return, a member is not required to go beyond the information given to him by the client, unless he has reason to believe that there is more than a slight possibility that it is inaccurate.

RULE No. 18

Members are discouraged from using on tax returns such statements as "Prepared without audit" or "Prepared from information supplied by taxpayer" as they have no legal significance and are subject to misinterpretation. The statement signed by the member on the tax return is all that is required.

RULE No. 19

It shall not be considered soliciting for a member to mail notices to regular clients advising them of an approaching filing date.

RULE No. 20

It shall not be considered soliciting for a member to contact regular clients, or anyone else for whom he has prepared a tax return or rendered tax service, in order to inform them of developments in the law which have occurred since the return was prepared or the advice given, and which affect the return or the advice. (A member may have an obligation to advise of such subsequent developments.)

RULE No. 21

A member must not hold himself out under any title which is not sanctioned by local practice in his profession.

see

74-18